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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Petitioner,*

v.

BANGOR & AROOSTOOK RAILROAD COMPANY, et al., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOSEPH L. RAUH, JR.
JOHN SILARD
HARRIETT R. TAYLOR
Rauh and Silard
1001 Connecticut Ave., N.W.
Washington, D.C. 20036

ISAAC N. GRONER
STEPHEN E. MOSS
Cole and Groner
1730 K Street, N.W.
Washington, D.C. 20006

HAROLD C. HEISS
DONALD W. BENNETT
Heiss, Day and Bennett
Keith Building
Cleveland, Ohio 44115
Attorneys for Petitioner.

Of Counsel:

ALEX ELSON
WILLARD J. LASSERS
AARON S. WOLFF
Elson, Lassers and Wolff
11 South LaSalle Street
Chicago, Illinois 60603

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered herein on July 31, 1967.

Opinions Below

The opinion and supplemental opinion of the Court of Appeals for the District of Columbia Circuit, dated May 12, 1967 and July 31, 1967 respectively, are not yet reported and are set forth in Appendix A at p. 1a and p. 36a. The judgment entered July 31, 1967 is set forth at p. 50a. An opinion and order denying respondents' petition for re-

hearing, issued on September 21, 1967, is set forth at p. 51a.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 31, 1967. A timely petition for rehearing filed by respondents herein was denied on September 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute Involved

Public Law 88-108 (77 Stat. 132, 45 U.S.C. following § 157) is set forth in Appendix B, pp. 55a to 58a, *infra*.

Question Presented

Public Law 88-108, an unprecedented 1963 emergency statute, subjected the fireman manning dispute between petitioner BLF&E and the nation's railroads to compulsory arbitration for a period "not to exceed two years." Reductions were effected under the Award during its two-year life in firemen jobs secured by existing collective bargaining contracts. Do such reductions continue in effect after the Award's expiration on March 31, 1966 and, further, may the railroads make additional reductions thereafter pursuant to the expired Award?

Statement of Facts

This case arises from the first Congressional experiment with the substitution of compulsory arbitration for collective bargaining.[1] Universal hostility of both employers and unions has been reflected in the scrupulous avoidance of compulsory labor arbitration in federal labor laws from

[1] The suggestion by the court below that the 1916 eight-hour day law upheld in *Wilson* v. *New*, 243 U.S. 332, constituted an earlier compulsory arbitration measure is strained. Congress, not an arbitration board, set the working standards in that instance. Cf. *Wolff Co.* v. *Industrial Court*, 262 U.S. 522.

their inception. But in 1963, under a threat by the nation's railroads to discharge their long-time firemen employees and the union's counter-threat of a nationwide strike, Congress enacted an emergency measure constituting a first and limited experiment with compulsory labor arbitration. Public Law 88–108 (pp. 55a to 58a, *infra*) authorized a two-year arbitration of the fireman manning dispute by a special arbitration board. That interim approach reflected a repeatedly-expressed Congressional hope and expectation that during the limited arbitration period, and faced with its forthcoming expiration, the parties would settle their differences through collective bargaining and arrive at a final resolution of the fireman manning issue.

However, at the expiration of the two-year Award on March 31, 1966, no agreement had been achieved between the parties (the railroads having refused to bargain with the BLF&E), and the employment rights of the firemen following the Award's expiration thereupon became the subject of this federal litigation. In its original and supplemental opinions rendered in this case in May, July and September of 1967, the court below has resolved against petitioner the basic issue of the continuation of the Award after its termination date. The court below finds that Award-approved reductions in contractually-required firemen jobs survive the Award's expiration and the court further rules that the Award authorizes additional firemen reductions even after its termination. We set forth below the salient legislative and judicial history upon the issue of post-Award fireman manning requirements, whose adverse resolution we ask this Court to review.

1. *The National Diesel Agreement of 1950*

This case involves the effect of special compulsory-arbitration legislation upon collective bargaining agreements; accordingly, the appropriate point of departure is

the last agreement between the parties. This was the National Diesel Agreement, signed in May of 1950 after the parties had followed the procedures of the Railway Labor Act and had successfully engaged in collective bargaining on fireman manning requirements. The 1950 Agreement was only the most recent in a series of such agreements dating back to the fireman manning clauses adopted in 1933 and 1937.

The 1950 Diesel Agreement provides that a fireman (taken from the seniority ranks of firemen) must be employed on every locomotive (J.A. 4, 129). This comprehensive requirement governed the employment of firemen upon the nation's railroads at all times until the two-year period of the special arbitration award promulgated under the 1963 Public Law. No successor collective bargaining agreement governing fireman manning requirements has been reached by the parties. Accordingly, the requirements of the 1950 National Diesel Agreement are now again in full effect unless modifications thereof by the statutory Award survived its expiration. Upon that central issue the history and text of the Public Law itself are illuminating and decisive.

2. *Genesis of Public Law 88-108*

In November, 1959, pursuant to Section 6 of the Railway Labor Act the railroads served a Notice upon the BLF&E which proposed to eliminate the requirement that firemen be employed on freight and yard engines; instead, the railroads proposed to leave the employment of firemen completely to managerial discretion (JA 5, 11, 60, 70-72, 76-77). In September, 1960, various unions including the BLF&E served counter-notices under Section 6 which dealt with the composition of train and yard crews in all classes of engine service (JA 5-6, 17, 60-61, 73, 77). After a succession of bargaining steps, including a special Presidential

Study Commission and intervention by the National Mediation Board, the dispute remained unresolved. On March 4, 1963 this Court (*Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284) ruled that all voluntary bargaining procedures having been exhausted the parties were free to resort to self-help. Efforts by an Emergency Board and the Secretary of Labor were unsuccessful. The railroads then announced that in July of 1963 they would change the rules unilaterally, causing the unions to respond that the result of such action would be a nationwide strike. On July 22, 1963, President Kennedy sent a Special Message to Congress proposing legislation to deal with the dispute on a temporary two-year basis (109 Cong. Rec. 13004, H. Doc. No. 142, 88th Cong., 1st Sess.).

3. *The Presidential Message*

In his Special Message to Congress proposing enactment of an emergency measure, President Kennedy expressly declared (109 Cong. Rec. at 13006) that among his objectives was to find a solution which:

> "(2) encourages the parties to achieve their own solutions through collective bargaining . . ." and
>
> "(5) provides for an *interim remedy* while awaiting the results of further bargaining by the parties" (Emphasis added throughout).

He recommended (*ibid.*) that "for a 2-year period during which both the parties and the public can better inform themselves on this problem . . . *interim work rules changes* proposed by either party to which both parties cannot agree should be submitted for approval, disapproval or modification to the Interstate Commerce Commission . . ."

President Kennedy's message repeatedly underlined that he was recommending "only interim changes", "interim rules" and "temporary procedures". He emphasized that he was not recommending "a general and permanent com-

pulsory arbitration law" but only a provisional remedy, which would be limited in time and effectiveness so as to accord preference always to collective bargaining: "The measure I am recommending today, in contrast with compulsory arbitration, gives encouragement and preference to solutions reached by collective bargaining, and provides only for interim decisions" (*id.* at 13007).

4. *The Congressional History*

President Kennedy recommended that during the proposed two-year period the "interim work rules changes" be controlled by decisions of the Interstate Commerce Commission. Opposition to use of the ICC developed in the course of the Congressional deliberations and Public Law 88-108 as ultimately enacted substituted a special arbitration board in place of the Commission. Otherwise Congress followed the Presidential recommendations. *Engineers* v. *Chicago, R.I. & P. R. Co.*, 382 U.S. 423, 432-433. Indeed, the entire Congressional history echoes the limited-life emphasis of the President's proposal. Thus the favorable Report of the Senate Committee on Interstate Commerce (S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963)) declared that:

> "Under the terms of the resolution, the arbitration award would be binding for no more than 2 years, unless the parties mutually agree to a different period. The committee has imposed this limitation in harmony with the President's recommendation, in order to closely limit the scope and impact of the resolution."

Again, in discussing Section 4 (the duration clause), the Senate Report pointed out that it would "provide that the Board would determine the period for which its award would remain in force, but would be no longer than 2 years unless the parties agreed otherwise" (*id.* at 11). The House Committee on Interstate and Foreign Com-

merce similarly underscored the limited duration of the arbitral award (H.R. Rep. No. 713, 88th Cong., 1st Sess. 14 (1963)):

> "The arbitration award is to be in effect for the period determined by the arbitration board but that period cannot exceed 2 years from the date the award takes effect; however, the award can be in effect for a different period if the parties agree thereto."

In the floor debates, as in the Committee reports, the delimited duration of the Award was repeatedly noted. Thus Senator Morse stated (109 Cong. Rec. 15976) that:

> "It appears to be the intention in this section, read in the light of the scheme of the resolution and of the legislative background, that these rules will provide a basis for the manning of the trains for the interim period only.
>
> "Stated conversely, the resolution does not authorize the Commission to approve rules which are dispositive of the entire manning issue for the indefinite future. The emphasis is on interim work rule procedures to be effective only until such time as the parties reach agreement regarding the entire matter or 2 years following the date the interim rule goes into effect, whichever occurs sooner."

Congressman Oren Harris, Chairman of the House Interstate and Foreign Commerce Committee which reported favorably on the measure, specifically advised the House that the pre-Award situation would be fully restored at the expiration of the Award *as though the legislation had never been passed.* He said (109 Cong. Rec. 16128, 16130):

> "So we have been trying to take a course that would bring these issues to final resolution where they could be settled. The resolution provides that on the

two major issues, order of the arbitration board would be in force for a period of 2 years. Then the issues go back under the regular established procedure of collective bargaining . . .

"Mr. Fulton of Pennsylvania. And at the end of a 2-year period that these arbitration rulings have been in effect, what would happen then?

"Mr. Harris. As I explained a moment ago, it goes back to the usual collective bargaining processes.

"Mr. Fulton of Pennsylvania. So then it is as if this resolution had never been passed at that time?

"Mr. Harris. That is true."

Speaking for the Administration before the Senate Committee on Commerce, Secretary of Labor Wirtz stated that the effectiveness of the arbitrated interim work rules "would terminate at the end of the 2-year period" (Hearings on S.J. Res. 102 Before the Senate Committee on Interstate Commerce, 88th Cong., 1st Sess. 49-50):

"Senator Pastore . . . The determination will last only for a period of two years. It is a temporary resolution; is that correct?

"Secretary Wirtz. I would assume, Mr. Chairman, in complete good faith within that 2-year period the parties would have worked out the resolution of this matter. If they would not, the effectiveness of that rule would terminate at the end of the 2-year period unless other action were taken."

Secretary Wirtz likewise emphasized the two-year limitation in his testimony before the House Committee (Hearings on H.J. Res. 565 Before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 55-56):

"Mr. Springer. At the end of the 2-year period

for which the order is entered where are you then on the same rule?

"Secretary Wirtz. The interim rule would at that point no longer be effective.

"Mr. Springer. You would be back exactly where you are this morning?

"Secretary Wirtz. I don't know what you mean by where we are this morning. If the parties had not accomplished anything at all in the 4-year period to which you refer, which is contrary to every reasonable expectation in this case, if they had accomplished nothing, then we would be, and none of them had accomplished anything, then we would face the same situation we do now."

Chairman Wolfe of the National Railway Labor Conference, the railroads' spokesman on the bill, also reiterated the temporary character of the legislation to the House Committee. When Congressman Moss noted that the railroads "are not seeking here, nor does the resolution, any elements of compulsion other than purely interim compulsion . . .", Mr. Wolfe replied, "I so understand the resolution" (*id.* at 570). When questioned by Congressman Dingell as to whether two years would be a sufficient time, Mr. Wolfe replied, "I believe that we consider that interim proposition is such as this, that 2 years is about as far as we should go" (*id.* at 555).[2]

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[2] In the courts below respondents made no answer to this massive legislative emphasis upon the limited two-year effect of the arbitral Award, except to claim that much of the legislative history set forth above concerned the Presidential proposal for arbitration by the ICC rather than a special board. But, as the court below emphasizes (*infra*, at p. 17a, n. 23 and p. 30a), quoting this Court's *Rock Island* decision, Congress enacted President Kennedy's proposal "with but 'one significant change' not relevant here"—the substitution of a special arbitration board for the ICC. Concerning the interim nature of the arbitral intrusion, the legislative intent throughout remained consistent with the President's emphasis.

5. *The Public Law*

Public Law 88-108 (Section 2) established an arbitration board of seven members, two each representing the carriers and the unions and three neutral members who were appointed by the President. The arbitration board was to "make a decision . . . as to what disposition shall be made" of the carriers' bargaining notices of November 2, 1959 concerning the use of firemen and other matters. The award of the board was to be "binding on both the carrier and organization parties to the dispute" (Section 3).

The effective life of the arbitral award was controlled by Sections 4 and 8 of the Public Law. Section 8 of the Public Law provided that "This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence." The last sentence of Section 4 provided that "The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise."

6. *The Award of Arbitration Board 282*

Arbitration Board 282 issued its Award on November 25, 1963 (J.A. 121).[3] With respect to the firemen the

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[3] A number of the Brotherhoods, including petitioner, promptly brought suit to challenge the validity of the statute and the Award, but both were sustained by the lower federal courts. *BLF&E* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11, affirmed 331 F. 2d 1020. The Brotherhoods petitioned for a writ of certiorari (*BLF&E* v. *Certain Carriers*, No. 935, October Term, 1963), but this Court denied review (377 U.S. 918) after the Government filed an Opposition urging that the case lacked importance because the Award would expire after two years:

> "The statute itself has already expired, except for the Award, which has a two-year life. . . . The narrow scope of this legislation—providing for binding arbitration of two issues in a particular dispute for a limited period—indicates that the case is not of sufficient general

Award provided in effect that in freight and yard service the railroads could designate positions (up to a ceiling of 90 per cent) from which firemen could be severed (see *infra*, p. 38a). Firemen who had less than two years of seniority could be severed upon payment of specified severance pay; those with more than two years but less than ten could be offered the option of comparable jobs with a minimum five-year guaranty of employment; firemen with more than ten years of seniority could not be severed (J.A. 108-114). The Award stipulated that "all agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen" continue undisturbed "except as modified by the terms of this Award" (J.A. 108).

Part IV of the Award, in faithful adherence to the Congressional requirement, provided that "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise" (J.A. 121).[4] Moreover, the opinion of the Board's neutral members underscores that they did not purport to promulgate rules which would continue after the two-year Award period: "The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen . . . actually eliminated may be comparatively small. Problems that are as deeply rooted and that have been as long in development as those here involved, however, cannot be solved overnight. . . . If, through this award, principles are established and procedures set

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importance to warrant review by this Court" (Brief in Opposition, pp. 24-25).

This representation has now been impugned by the ruling below giving continuing effect to the Award.

[4] Pursuant to an agreement between the parties the Award's duration was extended for a short period and expiration was fixed at 12:01 A.M., March 31, 1966 (J.A. 9-10, 20-21, 67, 81).

in motion which contribute to a final solution, our hopes as neutral members of this Board will have been fulfilled." *Opinion of Neutral Members,* 41 LA 680, 681 (1963).[5]

In like fashion, after promulgation of the Award the Chairman of the Arbitration Board, Mr. Ralph Seward, made clear the limited duration of the Award in testimony before the Senate Commerce Committee (Hearings on the Administration of Public Law 88-108 Before the Senate Committee on Interstate Commerce, 89th Cong., 1st Sess. 359 (1965)):

> "Senator Pastore: But the fact of the matter is, that there would be an elimination, as a practical and realistic conclusion, 90 percent of the slots?
>
> "Mr. Seward: If there were time enough, that would result, yes . . .
>
> "Senator Pastore: What do you mean by, 'If there were time enough'?
>
> "Mr. Seward: Just that in 2 years, which our award only runs for 2 years, this procedure, the processes of attrition, could not operate enough to take—to allow the elimination of that number of jobs."

During the two-year life of the Award, and pursuant to its provisions, the railroads effected the severance from employment of some 18,000 men—approximately half of the 36,500 firemen working just prior to the Award (Hearings on H.J. Res. 565 Before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., 1963). This was three times as great a reduction as the

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[5] On the basic dispute over fireman manning the neutral members of Arbitration Board 282 examined the opposing contentions and concluded that "The record contains no evidence to support the charge, frequently and irresponsibly made, that firemen presently employed in road freight and yard service throughout the country are being paid to do nothing and actually perform no useful work." 41 LA at 687. They made a finding to the contrary: "We think it clear", said the opinion, "that firemen are presently performing useful services." 41 LA at 688.

Arbitration Board itself had expected (see *infra*, p. 41a, n. 1). The net payroll gain to the railroads during the life of the Award, after deduction of severance allowances paid by them, was in excess of one hundred forty-three million dollars (J.A. 132).

7. *The Railroads' Unlawful Refusal to Bargain*

In enacting the Public Law, Congress pinned its hopes for ultimate resolution of the manning dispute not upon a final arbitral Award but upon interim arbitral intervention to be supplanted by collective bargaining resolution of the fundamental issue. That emphasis is found in the preamble recitation that it is desirable to achieve the stated objectives of the Public Law *"in a manner which preserves and prefers solutions reached through collective bargaining"* (p. 55a, *infra*), and is repeated throughout the legislative history. President Kennedy urged a Congressional enactment which would encourage "the parties to achieve their own solutions through collective bargaining" by "an interim remedy while awaiting the results of further bargaining by the parties" (see p. 5, *supra*). Senator Morse underlined that the two-year arbitration proposal "would encourage and stimulate the parties to continue to bargain in order to develop final solutions . . ." (109 Cong. Rec. 15976). Secretary Wirtz made the same point in his Senate testimony in response to a question about the temporary nature of the arbitration: "I would assume, Mr. Chairman, in complete good faith within that 2-year period the parties would have worked out the resolution of this matter" (see p. 8, *supra*). To the same effect was testimony by Chairman Wolfe of the National Railway Labor Conference, who told the House Committee of his "hope" that during the two-year period "the parties will themselves have disposed of these issues in conference within the procedures of the Railway Labor

Act." Indeed, Mr. Wolfe *promised* that Committee "We will be willing to bargain under any circumstances". (Hearings on H.J. Res. 565 Before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess. 559 (1963)).[6]

Congress thus expected that during the period of the Award the parties would come to a voluntary agreement concerning the manning requirements to apply upon its expiration. Undoubtedly, Congress believed that the parties' experience under a temporary Award requiring both sides to recede from their ultimate positions would facilitate collective bargaining of a permanent solution. This Congressional anticipation was honored by the BLF&E but frustrated by the railroads. On November 15, 1965, many months before expiration of the Award, the BLF&E in its Notice No. 1 (J.A. 144-147) requested the railroads to bargain a modified manning provision which *"would have pegged employment at a level of 6000 jobs below the terms of the National Diesel Agreement."*[7] If the railroads had met and negotiated in good faith about post-Award manning requirements—as Congress expected—there would likely have been achieved for the first time a negotiated reduction in fireman manning requirements.

However, the railroads adamantly—and unlawfully, as the court below finds (p. 21a, *infra*)—refused to bargain about manning requirements applicable upon expiration of the Award (J.A. 164-166). For this frustration of the Con-

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[6] It is worthy of note also that in October of 1965, after seventeen days of hearings concerning the administration of the 1963 Award, the Senate Commerce Committee passed a Resolution calling upon the parties to engage in further collective bargaining (J.A. 142).

[7] See opinion below, p. 25a, *infra*. It is notable that the 6,000-man reduction offered by the BLF&E as its *initial* bargaining position was actually more than the 5,500 reductions which the Chairman of the Arbitration Board testified the Board had anticipated under its Award. Hearings on the Administration of Public Law 88-108 Before the Senate Committee on Interstate Commerce, 89th Cong., 1st Sess. 364 (1965). See p. 41a, n. 1, *infra*.

gressional intention—accomplished in the face of the railroads' own *promise* of bargaining made to Congress by their witness—the railroads have never given an explanation. But their refusal to bargain is adequately explained by their subsequent conduct. Instead of negotiating for a solution, they staked their post-Award hopes upon a judicial fiat continuing the job reductions effected under the temporary Award and authorizing even further fireman attrition.

8. *Issues Resolved By the District Court*

Prior to the expiration of the Award the railroads filed suits in the United States District Court for the District of Columbia for declaratory judgments governing the rights of the parties after expiration of the Award. Their actions were filed on January 19, 1966 against the Brotherhood of Railroad Trainmen and on March 24, 1966 against the BLF&E (J.A. 43; No. 20,192 in the court below). The suit against the firemen and an earlier test suit by the BLF&E (J.A. 2; No. 20,193 in the court below) were tried upon stipulation of the facts. The opinion of District Judge Holtzoff, filed May 9, 1966 (J.A. 219), ruled against the BLF&E on its basic contention, as it did on nearly every issue.[8]

The District Court expressly rejected (J.A. 223) the position of the BLF&E that the pre-Award fireman manning requirements of the National Diesel Agreement were restored to effect when the Award expired. According to the District Court "the Award and the operations under it created a new status in regard to rules and working conditions"— a "new plateau" which survives the expiration

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[8] The BLF&E's 1965 bargaining notices were held premature and non-bargainable (J.A. 226-228). The railroads were therefore exonerated from any unlawful refusal to bargain before the expiration of the Award and a BLF&E strike was ruled a violation of the Railway Labor Act duty to exhaust bargaining steps before invoking self-help (J.A. 223, 228).

of the Award until and unless changed by agreement of the parties. In the District Court's view, fireman positions vacated during the interim Award were "*permanently abolished*" (J.A. 224).

But Judge Holtzoff went even further and authorized *continuing* reductions after the expiration of the Award. Although asserting that "neither side may take any further affirmative steps under the Award after its termination date" (J.A. 224), he approved additional reductions in the ranks of firemen by "attrition" resulting from the non-filling of new vacancies occurring after Award expiration.[9] Subsequent rulings by Judge Holtzoff soon diluted even further his "affirmative acts" proscription. Several suits were heard before Judge Holtzoff in September of 1966 testing various means by which the railroads have been effecting additional firemen reductions after the Award. The Judge in each case permitted additional reductions by the very "affirmative steps" he had earlier seemed to prohibit.[10] All such unilateral railroad acts to reduce the ranks of the firemen are, of course, prohibited by the National

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[9] Thus, the Court rejected the BLF&E argument that after the Award "whenever any fireman dies, retires, or resigns, thereafter his position should be filled by a new appointment" (J.A. 224). The railroads, according to the Judge, are under no obligation "to fill future vacancies," because it is not required that "vacancies occurring by attrition after the [Award] termination date need be filled" (J.A. 224, 225).

[10] Among those rulings were approval of forced transfer of firemen from more desirable jobs (by vacating jobs manned during the Award) to less desirable jobs at distant places resulting in dollar savings to the railroads; indefinitely furloughing men without pay to reduce the firemen's ranks; "blanking" of runs newly created after the Award so as to operate them without a fireman; and similar measures. Judge Holtzoff's adverse rulings in these several respects, entered months after his issuance of the judgment in the underlying actions, were duly appealed by the BLF&E to the court below in *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostock Railroad Company, et al., The Atchison, Topeka and Santa Fe Railway Company, et al.*, Nos. 20,472, 20,473, 20,909 and 20,910 and in *Brotherhood of Locomotive Firemen and Enginemen* v. *New York Central Railroad Co.*, No. 20,647. By stipulation of the parties those appeals have been held in abeyance pending the resolution of the underlying issue in this case.

Diesel Agreement; in approving them, the District Court was constrained to find that authority for such railroad action derives from the continuing impact and effect of the expired Award.

9. *The Ruling Below*

Unlike the District Court, the Court of Appeals resolves the collective bargaining issues against the railroads.[11] But like the District Court, it rejects the BLF&E's principal contention that fireman reductions effected under the Award do not survive its expiration; in its opinion of May 12, 1967, the court below holds that firemen positions vacated during the Award remain vacated after its expiration. And in its supplemental opinion of July 31, 1967, the court goes further and rules that jobs manned during the Award may be left vacant when a fireman leaves that position due to death, retirement, etc., after the expiration of the Award.[12]

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[11] Thus, the court finds (p. 21a, *infra*) that BLF&E Notice No. 1 was both timely and bargainable, and that in refusing to negotiate thereon the railroads "breached their statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules."

[12] The court below did make clear in its supplemental opinion (p. 43a, *infra*) that all "new runs" established after the expiration of the Award must be manned by firemen and that full observance of the Diesel Agreement in "full crew" states continues to be required. The railroads filed a petition for rehearing against these rulings, which was denied by the court below on September 21, 1967 "without prejudice however to the [Arbitration] Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award" (p. 52a, *infra*). On October 19, 1967, after hearing counsel for both the railroads and the BLF&E, Arbitration Board 282 declined to submit any such statement. On October 23, 1967, the railroads filed in the court below a motion to vacate that court's September 21st denial of their petition for rehearing, and to stay further proceedings while they requested Arbitration Board 282 to answer at their own invitation questions which the Board had declined to answer at the invitation of the court below. On November 9, 1967, the Court of Appeals denied (p. 53a, *infra*) this last effort of the railroads to overturn the part of the judgment below which went in the BLF&E's favor.

Severe in its impact on the firemen is the ruling that on a run operated with a fireman at the expiration of the Award, the carrier may subsequently refuse to replace him at death or retirement if the run had been designated for blanking before the Award expired. The court thereby permits the railroads to reduce even further the number of jobs requiring firemen (and thus the total number of working firemen) after the Award has expired. But even harsher in effect is the court's ruling that some 18,000 jobs vacated during the Award—half of the total number of existing firemen jobs in 1963 before the Award's promulgation—*remain permanently vacated even after the Award's expiration.* In that respect the court below approves the conclusion of the District Court "that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition and that the new plateau of work rules . . . continued in effect . . ." (p. 5a, *infra*). This result the court below premises upon an analogy with contract modifications achieved by consent of the parties, which it asserts have continuing validity under the Railway Labor Act until modified by further bargaining (p. 14a, *infra*):

> "Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired . . . Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days

> in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. 'The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination.' It likewise applies even though the work rules are established by an arbitration award of limited duration."

Of course, in holding by an analogy to voluntary contract modifications that the expired Award has continuing effect, the court is constrained to reject both the plain meaning and the legislative history of Public Law 88-108. Thus, the court concedes (p. 14a, *infra*) that the Brotherhood's statutory argument "has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way." And the court similarly concedes that "The National Diesel Agreement was not set aside by the Board. As already noted the opening section of the Award provided that agreements in force continued in effect except as they were modified by the Award. The Award provided a procedure for modifications during the two-year life of the Award." But the court tenders the following rationalization (p. 15a, *infra*) for its rejection of the "formal logic" of plain meaning, the legislative history, and the expressly delimited contract inroad of the Board's Award:

> "We think its [the BLF&E] construction of Public Law 88-108 would be unreasonable and inconsistent with the purposes and context of the legislation. It must have been reasonably contemplated that the Board of Arbitration might order deflation of the scope of existing overmanning. And it seems obvious that an automatic rescinding of any such pruning at the instant the Award was to terminate would spark the most unsettling havoc. To reach this result would

necessarily mean trying to recreate a practically unrecoverable situation and sweeping away a host of rights that had already vested concomitant with the award, made final under the Act, permitting reductions in the work force."

Thus, the nub of the court's rejection of plain meaning is its reliance on a presumed Congressional intention permanently to reduce the firemen's ranks through the limited-life Award. But the court cites no legislative evidence of any sort for that crucial Congressional intention. Instead, it states that it *"must have been reasonably contemplated"* by Congress that *"deflation"* of the number of firemen would be permanently effected by the interim Award.

The court gives a remarkable explanation for preferring its *supposedly self-evident* surmise of what Congress "must have" contemplated to the statutory expiration clause's plain meaning and the consistent legislative history. It states (p. 14a, *infra*) that concerning the question of job rights obtaining upon the Award's expiration *"Congress was undoubtedly aware of the problem but apparently thought wisdom lay in avoidance of express delineation."* Thus, in rejecting plain meaning on the basis of a wholly *presumed* Congressional intention, the court below explains that Congress thought "wisdom lay in avoidance of express delineation" of its intent. In Congressionally-respectful but unmistakable terms the court appears to be saying that Congress was afraid to express its intent permanently to reduce the number of firemen under a temporary arbitration law, but hoped that the courts would reject the plain meaning of its statutory termination date and its repeatedly-expressed temporary purpose and give effect to a surmised intent. By this remarkable sleight of hand, half of the total number of firemen become *permanently displaced* under an unprecedented interim arbitra-

tion law approved after assurances by the Congressional leadership that upon its expiration the status quo would be *"as if this resolution had never been passed"* (p. 8, *supra*). Entirely disregarded is the Senate Committee's emphasis that the expiration clause was intended "to closely limit the scope and impact" of the Congressional intrusion (p. 6, *supra*). And since even the Arbitration Board *itself* never indicated an intention to make its job reductions effective after expiration of the Award, the conjury of the court below is doubly remarkable—both the rabbit and the hat are revealed as products of judicial invention.

* * * * *

By the ruling below, the interim and strictly limited compulsory arbitration experiment which Congress adopted with reluctance, has been transformed into a continuing abolition of workers' jobs. We do not, however, urge this Court's review solely because the court below has erroneously resolved an important statutory issue. Rather we emphasize as reason for review that judicial intrusion upon the delicate political balance Congress struck in this unprecedented statute invokes a sensitive issue in the relationship of the federal courts and the Congress; that circumstance particularly requires the attention of the nation's highest tribunal.

Reasons for Granting the Writ

AN IMPORTANT QUESTION FOR THIS COURT'S REVIEW IS PRESENTED BY THE LOWER COURT'S REJECTION OF THE PUBLIC LAW'S PLAIN MEANING AND LEGISLATIVE HISTORY, SUPPLANTING THE SENSITIVE CONGRESSIONAL COMPROMISE WITH A JUDICIALLY-IMPROVISED SUBSTITUTE.

This Court has most recently emphasized that in an era of "automation and onrushing technological change, no problems in the domestic economy are of greater concern

than those involving job security and employment stability", which have engaged general attention "because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation . . ." (*Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 640). Within this area of grave national concern, this case presents an important federal question of legislative-judicial relationships. Accentuating the importance of that question is the consideration that this Court's resolution of the central issue herein will be dispositive or controlling in a large volume of pending federal litigation involving ancillary issues concerning the continued effect, if any, of the expired Award.[13]

1. *Rejection of the Public Law's Manifest Intent.* In 1963 under the stress of a national emergency, Congress enacted an unprecedented compulsory arbitration measure on the basis that its effect would not exceed two years. As the court below admits, Congress "hoped and expected" that in the two-year period the parties would voluntarily and finally resolve the underlying issue. As the court below also finds, that expectation was frustrated by the railroads' violation of their statutory duty (and indeed their express promise to Congress) to negotiate the fireman

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[13] Pending in the District of Columbia Court of Appeals (p. 16, *supra*) are five appeals, Nos. 20,472, 20,473, 20,909 and 20,910 involving firemen orders issued by the District Court subsequent to the judgments involved herein in *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook Railroad Co., et al., The Atchison, Topeka and Santa Fe Railway Company, et al.*, and No. 20,647, *Brotherhood of Locomotive Firemen and Enginemen* v. *New York Central Railroad Company*. Pending in the 5th Circuit are Nos. 23,622 and 23,815, *Brotherhood of Locomotive Firemen & Enginemen* v. *United States ex rel Central of Georgia Railway Company and Southern Railway Company*, and *Brotherhood of Locomotive Firemen and Enginemen* v. *Central of Georgia Railway Company and Southern Railway Company*. Pending in the 6th Circuit is No. 17,588, *Brotherhood of Locomotive Firemen and Enginemen* v. *Louisville & Nashville Railway Co.* Cases which would be disposed of or materially affected in which the BLF&E is plaintiff or defendant are also pending in United States District Courts in the District of Columbia (No. 3364-66), the Eastern District of Pennsylvania (No. 42,178), the Northern District of Indiana (No. 4803), and the Western District of Pennsylvania (No. 27-67 Erie).

issue with the union during the life of the Award. The principal cause of the necessary return to the status quo ante was thus the railroads' own refusal to bargain on the BLF&E's new contract offer of sizeable reductions in the ranks of the firemen.[14] Nevertheless, the court below, repelled by its view of the practical impact of a situation created by the railroads themselves, rejects the plain meaning of the statute which would require the railroads to hire replacements for the 18,000 firemen they separated during the life of the Award. Its ground for rejection is the *practical effect* of enforcing strictly the termination provision which would require return to the pre-existing fireman manning requirements.

It is unnecessary to belabor the impropriety of the lower court's statutory interpretation. As we have shown (*supra*, pp. 5-10), that the Award's effect would be wholly temporary and that collective bargaining alone would supply a solution thereafter, was not only manifested by the plain terms of the statute's expiration provision, but by the entire legislative history. This Court emphasized in *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 100, that particularly in the area of the delicate compromises in our labor law between strong contending forces, there is no warrant for replacing what Congress has written with "broad policy," for ". . . it is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted." That ascertainment permits recourse to judicial judgment "within the limits

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[14] Significantly, the court below twice refers (*infra*, p. 25a and p. 31a, n. 48) to the 6,000-man reduction in the number of firemen under BLF&E's Notice No. 1 of November 1965, but it brushes off this concession as negligible because the railroads actually separated some 18,000 firemen during the Award. However, the court itself (p. 41a, n. 1, *infra*) cites the testimony of Arbitration Board Chairman Seward that the Board had anticipated a reduction of only some 5,500 firemen. Thus the 6,000-man reduction offered by the Brotherhood was actually a concession at the very *outset* of bargaining of *more* than the Board itself had expected in firemen reductions under its Award.

of the relevant legislative materials. Most relevant, of course, is the very language in which Congress has expressed its policy . . ." (*ibid.*).[15]

Recent federal labor statutes—results of "conflict and compromise between strong contending forces and deeply held views" (*id.* at 99)—have proved needful of this Court's protection from distortive adjudicatory expansion. See, *e.g.*, *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612; *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195. Faced with an argument based on practical considerations far stronger than the railroads advance here, this Court in *Atkinson* condemned the "startling proposition" that Congress "was willing to confer a power upon the courts to 'accommodate' . . . [the Norris-LaGuardia Act] out of existence whenever they might find it expedient to do so . . ." (*id.* at 209). No less startling and worthy of this Court's review is the action of the court below substituting its own conception of a "practical result" to accommodate the Public Law's termination clause out of existence.

2. *Conflict with this Court's* Rock Island *Decision.* In *Engineers* v. *Chicago, R.I. & P.R. Co.*, 382 U.S. 423, this Court itself emphasized the sharply delimited period of the compulsory intrusion by Public Law 88-108 upon the

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[15] This Court has applied and characterized the plain meaning rule in the following terms: "the courts, in interpreting a statute, have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results • • • or would thwart the obvious purpose of the statute.' *Helvering* v. *Hammel*, 311 U.S. 504, 510-511, cf. *Commissioner* v. *Gillette Motor Co.*, 364 U.S. 130, 134, and *Commissioner* v. *P. G. Lake, Inc.*, 356 U.S. 260, 265. But it is otherwise 'where no such consequences would follow and where • • • it appears to be consonant with the purposes of the Act • • •' [citations]". *Commissioner* v. *Brown*, 380 U.S. 563, 571. Courts must "apply statutes on the basis of what Congress has written, not what Congress might have written". *U.S.* v. *Great Northern R. Co.*, 343 U.S. 562, 575. The court cannot "speculate about a Congressional purpose for which there is no support" in the legislative text or history. *U.S.* v. *Public Utilities Comm'n*, 345 U.S. 295, 311.

pre-existing status quo. There the railroads argued before this Court (Brief, pp. 20, 60) that the effect of the Award would not terminate on the date specified because Congress integrated the arbitration under P.L. 88-108 into the Railway Labor Act so that the rules and procedures established by the Award would continue to apply after the expiration of the Award until changed in accordance with that Act. Indeed, with respect to the status of the full crew laws, the railroads urged (Brief, p. 59) the very rationale espoused by the ruling of the court below in the present case—that "when Congress directed the Board to make a 'complete and final disposition' (P.L. 88-108, § 3) of the fireman and crew consist issues, it knowingly authorized a long-range solution, not one which could be cast aside two years later by reactivation of the full crew laws . . .".

In rejecting these arguments this Court's *Rock Island* decision emphasized President Kennedy's "hope that the dispute could eventually be settled by collective bargaining" (at p. 431); that the Presidential proposal expressed "no desire to have Congress pass a law that would finally and completely dispose of the problem" (at p. 432); and that "Congress wanted to do as little as possible in solving the dispute which was before it", providing only an "interim remedy" for "a period not exceeding two years from the date the awards would take effect" (at pp. 431, 433). The legislative intent emphasized by this Court in *Rock Island* most strongly reinforces the plain meaning of the statute's Award-expiration clause. Integral to the *ratio decidendi* of this Court's *Rock Island* opinion is the proposition, rejected by the court below here, that the intrusion on the pre-existing status quo was fully terminated upon the expiration of the statutory Award.

3. *Conflict with a Basic Congressional Tenet.* In giving continuing effect to manning reductions accomplished under

what Congress enacted as a strictly temporary measure, the court below approves what Congress for more than four decades has repeatedly refused to enact. Time and again in the enactment of federal labor laws since the Railway Labor Act of 1926, Congress has emphasized its opposition to compulsory arbitration of labor disputes—a view reflected again in 1963 in Congressional approval in an emergency situation of no more than an interim arbitral intrusion upon collective bargaining.

In 1926, and again in 1934, Congress enacted laws governing railway labor.[16] Yet on both those occasions, Congressional antipathy to compulsory arbitration of collective bargaining disputes precluded any serious consideration of such a provision. The Railway Labor Act significantly highlights this antipathy: it provides that once an agreement has been reached, "minor disputes" as to its meaning are subjected to compulsory arbitration by the National Railroad Adjustment Board (45 U.S.C. § 153). But resolution of "major disputes" as to what the contract *shall* contain was specifically left voluntary (45 U.S.C. § 157), in accord with the overwhelming sentiment of both the Congress and the country.[17] In both 1926 and 1934 support for voluntarism and opposition to compulsion came from labor and management, from government officials and private citizens, from political party platforms,

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[16] Railway Labor Act, ch. 347, 44 Stat. 577 (1926); Railway Labor Act, ch. 691, 48 Stat. 1185 (1934).

[17] Some indication of the depths of this sentiment may be found in the heated—and successful—opposition to a minority proposal to give powers of compulsory process to such a voluntarily established arbitration board. See, *e.g.*, Hearings on S. 2306 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. 184 (1926) (testimony of the counsel for the Organized Railway Employees); 67 Cong. Rec. 4569 (remarks of Representative Rayburn); 67 Cong. Rec. App. 9162 (daily ed. May 11, 1926) (remarks of Senator Watson, Chairman of the Committee); Hearings on H.R. 7650 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 67 (1934) (testimony of the Chairman, U.S. Board of Mediation).

and from congressmen.[18] As this Court emphasized in the context of this very dispute, "the Railway Labor Act . . . does not undertake governmental regulation of wages, hours, or working conditions." *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 289.

Congress' concern to protect the principle of voluntarism was manifested even more strongly in 1932 when it enacted the Norris-LaGuardia anti-injunction act.[19] Although compulsory arbitration *per se* was not an issue, its rejection was implicit in the enactment of legislation whose "raison d'etre" was the protection of labor's right to strike for a collectively-bargained contract free from "government by injunction."

In the 1935 National Labor Relations Act Congress once again reaffirmed its opposition to pre-contract compulsion. Section 13, affirming the sanctity of the right to strike,[20]

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[18] See, *e.g.*, Hearings on S. 2306, *supra*, n. 17, at 160 (testimony of D. Willard, Pres., B&O Railroad), 169 (letter from R. Easley, Chairman, National Civic Federation), 193 (testimony of E. Rich, representing six manufacturers' associations), 199, 213 (testimony of J. Emery, counsel, N.A.M.), 222 (letter of W. Green, Pres., AF of L); 67 Cong. Rec. 4225, 4231 (daily ed. Feb. 24, 1926) (remarks of Reps. Nelson and Mapes); 67 Cong. Rec. App. 4594, 4596, 4600 (daily ed. Mar. 2, 1926) (remarks of Rep. Barkley); 67 Cong. Rec. 4283 (daily ed. Feb. 25, 1926) (remarks of Rep. Rayburn); 67 Cong. Rec. (daily ed. Feb. 26, 1926) at 4348 (remarks of Rep. Jacobstein), 4355, 4356 (remarks of Rep. Hawes), 4363, 4364 (remarks of Rep. Beedy), 4368 (remarks of Rep. Parker, Chairman of the Committee); 67 Cong. Rec. 4400 (daily ed. Feb. 27, 1926) (remarks of Rep. Newton); 67 Cong. Rec. App. 4603 (daily ed. Mar. 2, 1926) (remarks of Rep. Greenwood); 67 Cong. Rec. App. (daily ed. Mar. 3, 1926) at 4675 (remarks of Rep. Ellis), 4677 (remarks of Rep. Carss); 67 Cong. Rec. App. 4836, 4837 (daily ed. Mar. 5, 1926) (remarks of Rep. Robsion); Hearings on H.R. 7650 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934) at 58 (testimony of J. Eastman, Federal Coordinator of Transportation), 118 (brief for the International Brotherhood of Teamsters). See also the National Republican Party Platform of 1924, (quoted by Rep. Cooper in 67 Cong. Rec. 4220, daily ed. Feb. 24, 1926), and the National Democratic Party Platform of the same year.

[19] 29 U.S.C. §§ 101-115 (ch. 90, 47 Stat. 70).

[20] "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike" (29 U.S.C. § 163).

was a reavowal of the conviction that forcible governmental intrusion is not desirable in the heat of a conflict over workers' economic rights. The policy against compulsory intrusion was underlined and applied to preempt state authority in *Automobile Workers* v. *O'Brien*, 339 U.S. 454, relying strongly on Senator Taft's emphasis that "there is a right to strike and that labor peace must be based on free collective bargaining." And integral to creation of the new National Labor Relations Board was the assurance given by the Senate Committee that the Board would not "compel the making of agreements" or dictate their terms, an assurance renewed in the 1947 enactment of Section 8(d) of Taft-Hartley. See *Labor Board* v. *American Ins. Co.*, 343 U.S. 395. Moreover, in the 1947 amendments Section 13 protecting the right to strike was preserved. And the one respect in which an inroad was made on collective bargaining options—the 90-day cooling off period in a national emergency—authorized merely an extension of the period of private negotiation rather than compulsory dictation of terms to the parties.

Against the background of this historical Congressional antipathy to compulsory labor arbitration, the ruling below giving permanence to a temporary statutory Award does not merely disturb Congressional intent on some peripheral issue. In enacting the Public Law, Congress was willing to put a toe in the waters of compulsory arbitration but the court below plunges in head-deep. The resulting statute, altered in its essential limitation and premise, is one that President Kennedy would not have sponsored and the 1963 Congress would not have enacted.

4. *Impugning of the Statute by Judicial Legislation.* In 1963 Congress was presented with President Kennedy's appeal for temporary legislation to avert a threatened national emergency arising chiefly from the fireman manning dispute. In so delimiting his proposal, President Kennedy was evidencing political realism: compulsory

arbitration might be required for the national good, but it was anathema to Congress; how best surmount this obstacle and induce cooperation? The answer was to ask no more than was absolutely necessary. This the President did; Congress understood it as such and enacted what was asked for but no more. Never in the history of Public Law 88-108 was there even a hint that it would have permanent effect. And, we submit, President Kennedy appraised the situation accurately: a less circumscribed, more extensive bill would have been defeated by deep-rooted Congressional aversion to compulsory arbitration.

In bypassing these realities, the court below rests its interpretation on presumed after-the-fact practicalities. By contrast, the Public Law itself was an intensely and uniquely political document. The underlying political foundation of the law was its two-year limitation. When it gives continuing effect to the Award, the court below erodes the founding premise for enactment of the entire statute, for it sanctions the very thing which Congress was most zealous to avoid. This Court, we submit, should not leave undisturbed a ruling which impugns the Public Law itself by emasculating its keystone limitation.

5. *Comity Considerations Call for High Court Review.* We have emphasized that the ruling below distorts the delicate political balance Congress struck in its first and limited experiment with compulsory labor arbitration. But there is ground for this Court's review irrespective of the rightness or wrongness of the Circuit Court's ruling. For the court below, asserting that Congress purposely left a gap in the statutory scheme, frankly embarks on a process of judicial legislation to fill the supposed void. That process, even if properly undertaken, invokes delicate relationships between the federal courts and the Congress requiring this Court's considered attention. This emergency Public Law was the result of a narrow Congressional compromise

in an area fraught with heated political controversy. If that Congressional compromise requires extension through a process of judicial legislation, surely it is this Court which should shoulder the ultimate burden. Comity toward and respect for the prerogatives of a coordinate branch call for the highest Court to render the judgment if a narrow and delicate Congressional balance on a vital public issue requires judicial revision.

This Court has frequently granted review where lower court rulings—presenting "delicate problems which call for the judgment of the nation's ultimate tribunal" [21]—touch upon the prerogatives and functions of the Congress, the Executive, foreign sovereignty or state authority. See, *e.g.*, *Coleman* v. *Miller*, 307 U.S. 433; *United States* v. *Mine Workers*, 330 U.S. 258; *United States* v. *Morgan*, 307

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[21] Justice Frankfurter (dissenting) in *Ex Parte Peru*, 318 U.S. 578, 602. The *Peru* case itself highlights this Court's role where sovereign prerogatives are at stake. There this Court employed its "all writs" power and ordered a District Court to release a foreign vessel after the Executive branch had undertaken to settle the underlying issue by diplomatic negotiation. This Court (at p. 587) declined to await Circuit Court review or even a District Court judgment before exercising its power because "it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized . . ." The Court's appreciation of its unique role is highlighted by the objection in the dissenting opinion (at p. 601) that the vessel already having been released, what was at stake was merely "the propriety of vindicating the dignity of a friendly foreign state."

This Court's role in cases involving considerations of comity is also recognized in the Constitution (see Article III, § 2, cl. 2) and in 28 U.S.C. § 1252. That statute, which provides direct appeal from judgments invalidating acts of Congress, was enacted in 1937 "chiefly as a result of the furor created by invalidation of Congressional legislation by lower federal court judges." Robertson & Kirkham, *Jurisdiction of the Supreme Court* 210 (1951 ed.). The considerations of Congressional dignity and prerogative which underlie direct review of lower court rulings striking down acts of Congress are equally invoked where intrusion on the will of the Congress may result from an elaborate exercise in judicial legislation.

U.S. 183; *In re Neagle,* 135 U.S. 1; *Missouri* v. *Holland,* 252 U.S. 416; *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10; *Graves* v. *New York,* 306 U.S. 466; *Watkins* v. *Conway,* 385 U.S. 188. There is reflected in those cases this Court's special role in assuring that principles of comity and separation of powers command judicial respect where sovereign or coordinate branch prerogatives are at stake. As the Court noted in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 407 (involving judicial recognition of a Cuban expropriation decree): "We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area."

The ultimate importance of review in this case thus rests on more than the need to vindicate the clear Congressional intention which the court below has eroded by giving continuing effect to an interim statutory Award. For even if (contrary to our contention) the lower court correctly reads the Congressional goal, there then arises the necessity of defining by a blend of contractual and statutory rights the extent to which the Public Law Award affects working rights after its expiration. Comity requires this Court itself to undertake so sensitive an exercise in judicial elaboration on the first Congressional experiment with compulsory labor arbitration.

Conclusion

For the reasons stated herein we urge that the writ should be granted.

Respectfully submitted,

JOSEPH L. RAUH, JR.
JOHN SILARD
HARRIETT R. TAYLOR
Rauh and Silard
1001 Connecticut Ave., N.W.
Washington, D.C. 20036

ISAAC N. GRONER
STEPHEN E. MOSS
Cole and Groner
1730 K Street, N.W.
Washington, D.C. 20006

HAROLD C. HEISS
DONALD W. BENNETT
Heiss, Day and Bennett
Keith Building
Cleveland, Ohio 44115
Attorneys for Petitioner.

Of Counsel:

ALEX ELSON
WILLARD J. LASSERS
AARON S. WOLFF
Elson, Lassers and Wolff
11 South LaSalle Street
Chicago, Illinois 60603

APPENDIX A: OPINIONS AND JUDGMENT BELOW

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,152

BROTHERHOOD OF RAILROAD TRAINMEN, SWITCHMEN'S UNION OF NORTH AMERICA, et al.,

Appellants

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellees*

No. 20,158

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,

Appellant

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellees*

No. 20,172

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellants*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, et al.,

Appellees

No. 20,215

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., *Appellants*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellee*

No. 20,216

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., *Appellants*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellee*

No. 20,229

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellees*

No. 20,191

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellants*

v.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, *Appellee*

No. 20,192

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*

v.

BANGOR AND AROOSTOOK RAILROAD COMPANY, et al., *Appellees*

No. 20,193

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., *Appellees*

No. 20,249

BROTHERHOOD OF RAILROAD TRAINMEN, *Appellant*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, et al., *Appellees*

Appeals from the United States District Court for the District of Columbia

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Decided May 12, 1967

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss*, were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

LEVENTHAL, *Circuit Judge:* This opinion deals with a number of appeals and cross-appeals in the railroad work rules litigation.

It may help if at the outset we indicate generally the nature of our views, though their precise exposition and the complexity of the issues require a long opinion. Part I of this opinion reviews the history of the passage by Congress in 1963 of a law providing for compulsory arbitration of the work rules controversy with an Award of two

years duration. In Part II we approve the conclusion of the District Court that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition and that the new plateau of work rules, established for early 1966 by the Award, continued in effect unless changed in accordance with the Railway Labor Act. In Part III, reversing a ruling of the District Court, we hold that even prior to the expiration of the Award the carriers had a statutory duty to respond to notices of the unions and begin collective bargaining about the rules to become effective following the expiration of the Award. In Part IV we conclude, reversing the District Court, that the railroad companies violated their duty to bargain with the Firemen, on the notice relating to prospective work rules, and with the Trainmen. We affirm other aspects of the decree, albeit for reasons somewhat different from those of the District Court, since we conclude that the railroads had no statutory duty to bargain over either another notice served by the Firemen, which sought to undermine rights vested under the Award, or the early notice served by the Conductors.

I

Understanding of the issues will be aided by a historical review of the problem.

The phenomenal growth of railroads in the 19th century was accompanied by evolution of complementary employee organizations. Railroad workers were among the first to organize unions to present employee demands collectively. The Order of Railway Conductors was founded in 1868, the Brotherhood of Railroad Firemen and Enginemen in 1873, and the Brotherhood of Railroad Trainmen in 1883. Labor relations in the railroad sphere has been the subject of Congressional enactments, and is now governed essentially by the Railway Labor Act.[1]

The last hundred years have also witnessed the evolution of an elaborate "common law" embracing the relations of railroad management and labor. There exists a roughly defined system that is the product of long-established practices and understandings, collective bargain-

[1] 45 U.S.C. §§ 151-63 (1964), as amended, 45 U.S.C. § 153 (Supp. II, 1966).

ing agreements, court decisions and administrative orders. The system covers among other things the manning of trains and the assignment of tasks to employees. These principles and patterns of behavior are collectively denominated "work rules."[2] As the Supreme Court has aptly put it, the railroad industry with its complex of regulations is virtually a "state within a state."[3]

Work rules concerning firemen date from the early days of the industry. Their initial chore was to select and load fuel into the wood-burning locomotive. The appearance in the late 1920's of the diesel engine spawned the problems that beset the industry to this day. The carriers consistently contended that the former loaders of wood were now merely dead wood. Yet beginning in 1933 the Brotherhood of Locomotive Firemen and Enginemen (hereafter BLFE) negotiated individual agreements with various carriers to preserve the continued status of firemen-helpers. The BLFE in 1937 joined with substantially all United States carriers in signing the National Diesel Agreement, providing for the employment of firemen-helpers on practically all diesel powered locomotives. Similar terms endured in subsequent contracts, including the Diesel Agreement of 1950.

While work rules retaining positions for firemen became thus established, the industry's quest for modernization resulted in almost one hundred percent diesel operation. In 1956 the carriers gave hint that intense competition from other modes of transport and the resulting financial pressure would no longer permit preservation of the ancient status. During negotiations on their proposal to give management the discretion to determine the employment of firemen the carriers withdrew this plan by agreeing to a three-year moratorium on such changes in work rules. But the die had been cast, and the carriers argued that the verdict of history and technology had come in, pronouncing railroad firemen extraneous members of a train crew. So too, they asserted, advanced technology

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[2] *See generally* Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115 (1964).

[3] *See* Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 371 (1955), quoted by Fortas, J., dissenting in Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157, 176 n.5 (1966).

and innovations would permit sharp reductions in the level of what is called the "crew consist," specifically the number of brakemen needed for the safe operation of the train.

It is against the backdrop of the always "sensitive and touchy problem"[4] of overmanning and efforts to overcome it that we focus on the events more immediately leading up to these appeals. In 1959 the carriers served notices under Section 6 of the Railway Labor Act,[5] proposing the elimination of firemen from freight and yard service, and the abrogation of regulations fixing the size of train crews. The following year, 1960, the unions served a series of counter-proposals directed at continuing and even extending the use of firemen and at setting the crew consist level at not less than one conductor and two brakemen plus such additional trainmen as the assurance of maximum safety demanded.

Shortly thereafter, in an effort to aid in the adjustment of this dispute, President Eisenhower appointed a special Presidential Railroad Commission to study the various facets of the problem. This Commission issued its report and recommendations in 1962. In general the carriers accepted the findings, but the unions balked.

Meanwhile, the lengthy procedures contemplated and mandated by the Railway Labor Act continued. Negotiations and mediation failed to bridge the gulf between the parties. The atmosphere of crisis heightened, for the Supreme Court ruled in March of 1963 that all the tools

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[4] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., 382 U.S. 423, 430 (1966).

[5] 45 U.S.C. § 156 (1964): Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

of the Act prescribed for the parties had been tried and found inadequate, and they were thus free to resort to self-help: that is, the unions could lawfully strike, or the carriers could unilaterally impose the new rules.[6]

The last device in the statutory arsenal was invoked. Acting under Section 10 of the Railway Labor Act, 45 U.S.C. § 160, the President, on a finding by the National Mediation Board of the threat of deprivation of essential transportation services, convened an Emergency Board to make a prompt investigation and report. For thirty days following the rendition of such a report no party may take unilateral action. The investigation was made and the report was filed.

Once again the unions proved unwilling to accede to the recommendations of others. During July of 1963 a flurry of tense negotiations was spurred by the active intervention of President Kennedy and the participation of Secretary of Labor Wirtz. The unions rejected the President's proffer of the services of Justice Arthur Goldberg as arbitrator of the dispute. For a fleeting period it appeared that voluntary arbitration would provide the answer, but though the parties indicated willingness in principle they could not get together in the procedural particulars of arbitration.

A strike was imminent. The country was faced with a serious emergency. No outstanding techniques remained to move the antagonists to a responsible accord. Only Congress could avert a national catastrophe, and it was to Congress that President Kennedy turned for unprecedented measures.[7] The Administration proposal, submitted July 22, 1963,[8] would have authorized the Interstate Commerce Commission to serve, in effect, as the agency for compulsory settlement of the threat by empowering it to put into effect, on the application of the parties, any of the changes proposed in the notices of 1959 and 1960 with such modification as it found appropriate in reconciling the private and public interest. That

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[6] Brotherhood of Locomotive Engineers v. Baltimore & O.R.R., 372 U.S. 284, 290-91 (1963).

[7] *See Message from the President of the United States Relative to Railroad-Labor Dispute*, H.R. Doc. No. 142, 88th Cong., 1st Sess. (1963).

[8] S. J. Res. 102, 88th Cong., 1st Sess. (1963).

resolution made it clear that these were to be only interim work rules to be effective until the parties themselves agreed on more permanent terms, but in no event to last for more than two years.

The law that was actually passed differed in various particulars from the Administration measure. The "one significant change"[9] made was the substitution of an independent *ad hoc* board of arbitration for the Interstate Commerce Commission, principally for the reason that Congress wanted to emphasize the peculiar and non-precedential nature of its emergency intervention. By August 28, 1963, this unique compulsory arbitration law, Public Law 88-108, had passed both Houses of Congress and received presidential approval. We set out this statute in an appendix to this opinion.

Public Law 88-108 expressly forbade any unilateral self-help by the parties who had served or received the notices of 1959 and 1960. It created a Board of Arbitration (since designated Board 282), to be composed of seven members, two each representing the carriers and unions, and the other three to be selected by the President if, as happened, the parties could not agree even on mutually acceptable neutral members. The Board was ordered to pass on the two focal issues of the use of firemen and the size and composition of train crews. The Award (since designated Award 282) was to "be binding on both the carrier and organization parties to the dispute and . . . constitute a complete and final disposition of the aforesaid issues. . . ." (Section 3). The effective date of the Award was set at sixty days after filing in the United States District Court for the District of Columbia. According to Section 4 the Award was to "continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise."[10] It is this provision specifying the maximum

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[9] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

[10] The measure was somewhat analogous to the legislative intervention in a 1916 rail dispute when Congress decreed that eight hours was to be the measure for a standard day in determining compensation, and forbade reduction in the standard day's wage until thirty days after findings were

mandatory duration that has sparked the issues we are now required to judge.

The Board met, held hearings, took evidence. It issued an Award that provided: 'This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise.'' An important extension agreement is that of the carriers and BLFE, which extended the termination date to March 30, 1966. Except for such agreement the Award expired at the close of the two year period on January 24, 1966.[11]

Award 282 held that the nearly two hundred carriers involved could eliminate ninety percent of the firemen positions, and set forth a procedure for dismissal and attrition. It was a staggering blow to the BLFE. The Award did not, however, authorize a single spasmodic discharge of thousands of firemen. Indeed, in some aspects it was ''highly favorable to the employees,'' *see In re Certain Carriers, Etc.*, 229 F. Supp. 259, 261 (D.D.C. 1964). Thus the Award guaranteed permanent employment for life, or until retirement or resignation, for every fireman who had been in active service for more than ten years, with a comparable job insured for all with service of two years or more. Those firemen with less than two years seniority were accorded severance allowances, amounting in some cases to six months pay. Under the terms of this Award the carriers have pruned eighteen thousand firemen from their ranks, paid out some $36,000,000 in separa-

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announced by a special commission created to study this system, to report back in six-to-nine months. The Supreme Court upheld this statute, characterizing it as a form of compulsory arbitration that was "limited" to a "reasonable period" fixed by the statute. *See* Wilson v. New, 243 U.S. 332, 345, 346, 351 (1917); *Message from the President, supra* note 7, at 4-5; S. Rep. No. 459, 88th Cong., 1st Sess. 8 (1963).

[11] The parties and the District Court have all accepted and implemented the Award as effective January 25, 1964. With that date marking the first day of the two-year period it is clear that the full two-year period expired at the end of January 24, 1966. We see no valid basis for the assumption of the District Judge that the Award was in existence on January 25, 1966. It may be regrettable, but we consider the Award rendered on January 25, 1966, by a special board of adjustment with respect to a dispute between BRT and the Green Bay & Western Railroad Co. and Kewanee, Green Bay & Western Railroad Co. to be without legal significance, unless it has been adopted by agreement of the parties, a question not before us.

tion benefits, and provided comparable jobs to twelve hundred former firemen.

On the crew consist issue, the Board determined that a single national standard would be inappropriate. It ruled that no change in crew consist be made except pursuant to the Award. Then it provided that where existing work rules required more or less than two trainmen, any party might give notice of a proposed change. If after conferences were held by the local properties no agreement was forthcoming, the issue could be referred to a special board of adjustment created at the local level. The Award articulated a series of "guidelines" to be followed by these special boards in resolving particular disputes. Many crew consist agreements and special awards were made under this procedure.

Pursuant to Section 9 of the Railway Labor Act, 45 U.S.C. § 159 (1964), as incorporated by reference in Section 4 of Public Law 88-108, the unions sued in the District Court for the District of Columbia to impeach the Award. The attack was two-pronged. First, they contended that the statute authorizing compulsory arbitration in this context was unconstitutional as beyond the power of Congress, or in the alternative as delegating power to an administrative body without adequate specificity of standards. Second, the unions argued that the Award did not conform to the statute under which it claimed vitality. The District Court rejected both challenges, and both approved the statute and confirmed the Award. *Brotherhood of Locomotive Firemen* v. *Chicago, B. & Q. R.R.*, 225 F. Supp. 11 (D.D.C. 1964). This court affirmed,[12] 118 U.S.App. D.C. 100, 331 F. 2d 1020, and the Supreme Court denied certiorari, 377 U.S. 918 (1964).

In subsequent months there poured into the courts, here and elsewhere, a number of actions, some brought by unions and some by railroads, presenting a plethora of particular problems,[13] but these skirmishes need not

[12] One judge dissented on the ground that the constitutional issues should have been referred to a three-judge district court.

[13] These actions were largely concerned with the proper construction of the statute or award in regard to individual fact situations. *See, e.g.*, Brotherhood of Railroad Trainmen v. Certain Carriers, Etc., 121 U.S.App. D.C. 230, 349 F. 2d 207 (1965); Brotherhood of Railroad Trainmen v.

detain us. What is critical to the situation now before us is this. Instead of using the two-year period specified by Congress and the Award to continue meaningful negotiations looking toward long range adjustments of the various vexing problems, guided by the experience gleaned from functioning under the Award's interim rules, the parties apparently focused on whether the expiration of the Award would leave them in a better position than they might achieve by return to the collective bargaining table, where some concessions might have to be made.

The positions adopted by the parties, distilled to their essentials, were as follows: The Unions believed that upon expiration of Award 282, authorized by Congress as a "final" settlement for a period "not to exceed two years," it would have no continuing significance. They assumed that immediately upon the expiration of the Award the status quo ante would revive and the National Diesel Agreements would once more control. This position was shared by the other unions who presumed the prior crew consist rules would return from a two year consignment to limbo. But as a hedge the unions also, during the effective period of the Award, served notices proposing in substance that on termination of the Award there would come into effect rules that were substantially similar to the old work rules, with relatively minor adjustments.

Not surprisingly, the carriers took a different view. As they saw it, the status created by Award 282 had an enduring quality that transcended the formal effective period of that Award. But they too, "just in case," served counter-proposals on the unions to preserve the benefits the Award had carved for them. As will appear in greater detail, the carriers declined to discuss the merits of any of these notices at the few conferences that were held prior to the termination of the Award, reasoning that although Public Law 88-108 and the Award permitted bar-

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Chicago, M., St. P. & Pac. R.R., 120 U.S.App.D.C. 295, 345 F. 2d 985 (1965); Atchison, T. & S.F.Ry. v. Brotherhood of Railroad Trainmen, 324 F. 2d 899 (7th Cir. 1963); In re Certain Carriers, Etc., 231 F. Supp. 519 (D.D.C. 1964); Brotherhood of Railroad Trainmen v. Missouri Pac.R.R., 230 F. Supp. 197 (E.D.Mo. 1964); In re Certain Carriers, Etc., 229 F. Supp. 259 (D.D.C. 1964).

gaining during that period they nevertheless stopped short of imposing a legal duty to do so. These are the two central questions of these appeals: What rules were in force the day after Award 282 expired? What was the duty of the parties to bargain about changing those rules, and when did it arise?

These appeals reach us from the orders disposing of suits and counter-suits seeking declaratory and injunctive relief, brought by the carriers and by the Brotherhood of Locomotive Firemen and Enginemen (BLFE), the Brotherhood of Railroad Trainmen (BRT), and Switchmen's Union of North America (SUNA), and the Order of Railway Conductors and Brakemen (ORCB). *See generally Bangor & A.R.R.* v. *Brotherhood of Locomotive Firemen,* 253 F. Supp. 682 (D.D.C. 1966) (Nos. 20192, 20193, 20215, and 20216); *Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen,* 250 F. Supp. 691, 252 F. Supp. 207 (D.D.C. 1966) (Nos. 20152, 20172), *supplemented,* 254 F. Supp. 306 (D.D.C. 1966) (Nos. 20229, and 20249); *Akron & B. Belt R.R.* v. *Order of Railway Conductors,* 253 F. Supp. 538 (D.D.C. 1966) (Nos. 20158 and 20191).[14]

II

In advance of the trial of these cases, the parties consented to the preliminary adjudication of the effect of the expiration of Award 282. In a guideline opinion underlying subsequent rulings, the District Court held that, even though the Award formally terminated, it had created a "new plateau" of work rules, which were to continue in force until changed pursuant to the regular procedures of the Railway Labor Act.[15] See *Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen,* 250 F. Supp. 691, 695-97 (D.D.C. 1966).

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[14] Appeal No. 20316, Brotherhood of Locomotive Firemen (and H. E. Gilbert) v. Bangor & A.R.R., arises from an adjudication of contempt for violating a temporary restraining order. Although it was argued together with these cases, it presents different questions and is being considered separately. *See* Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 255 F. Supp. 476 (D.D.C. 1966).

[15] *Compare* Manning v. American Airlines, Inc., 329 F. 2d 32, 34 (2d Cir.), *cert. denied,* 379 U.S. 817 (1964). *See also* Manning v. American Airlines, Inc., 221 F. Supp. 301 (S.D. N.Y. 1963).

The BLFE argues that the intention of Congress in giving the Award a limited 2-year life was to deny it any further legal effect, to leave the parties as if the award had never been in existence, and to restore the status quo ante with the result that the day after the Award expired the work rules in effect were the same as those in effect when the statute was passed. This approach has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way. Our approach in ascertaining "legislative intent" is hampered by the fact that the possibility that by the end of the formal duration of the Award the parties might not have agreed on anything to take its place is a subject on which the legislative history is, to use Justice Harlan's phrase, "essentially negative, which shows with fair conclusiveness only that Congress was not squarely faced with the problem this case presents."[16] In our case there is the added consideration that Congress was undoubtedly aware of the problem but apparently thought wisdom lay in avoidance of express delineation.

We think the mere limitation of the effective period of the Award neither implies nor compels the construction the unions seek. Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired. The legal underpinning for our ruling is not the Joint Resolution, which expired after 180 days of life—except insofar as necessary to sanction the Award. The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty

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[16] *National Woodwork Mfrs. Ass'n v. NLRB*, — U.S. —, —, 35 U.S.L.W. 4349, 4360 (U.S. April 17, 1967).

days in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. "The effect of §6 is to prolong agreements subject to its provisions regardless of what they say as to termination."[17] It likewise applies even though the work rules are established by an arbitration award of limited duration.

This by no means suggests that there is no legal significance in establishing an award or agreement as one of limited duration. The limited duration has the obvious significance that work rules can be changed for the post-expiration period. The work rules can be changed, however, only by compliance with the provisions of the Railway Labor Act prescribing how changes in work rules are to be effectuated.

What we are in effect holding is that since Public Law 88-108 is silent as to the applicable legal rule, the case is governed by the combination of undeniable physical facts plus the general legal rule of the Railway Labor Act. The BLFE is constrained to find superseding intention in Public Law 88-108 which would in effect obliterate not only the Award as a document with legal effect but also the physical facts that came into being during the 2-year period. We think its construction of Public Law 88-108 would be unreasonable and inconsistent with the purposes and context of the legislation. It must have been reasonably contemplated that the Board of Arbitration might order deflation of the scope of existing overmanning. And it seems obvious that an automatic rescinding of any such pruning at the instant the Award was to terminate would spark the most unsettling havoc. To reach this result would necessarily mean trying to recreate a practically unrecoverable situation and sweeping away a host of rights that had already vested concomitant with the award, made final under the Act, permitting reductions in the work force. Such a view would also wipe out the supposedly permanent guaranty of employment for those thousands of employees whose seniority, the Award decreed, entitled them to lifetime protections.

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[17] Manning v. American Airlines, Inc., *supra* note 15, 329 F. 2d at 34.

III

We turn now to the question to what extent and by what procedure the parties could and did lawfully invoke the machinery prescribed by the Railway Labor Act in order to change the work rules in effect on the railroads at the expiration of the Award, rules that had been prescribed by the Board (including the crew consist rules prescribed by various local boards).

As already stated, these work rules were not immutable. Congress had enacted a compulsory arbitration measure of limited duration. The appropriateness of a limited duration for a compulsory arbitration measure, articulated by the Supreme Court 50 years ago in *Wilson* v. *New*, had been emphasized by the President and Congress.[18]

When were the parties to bargain about possible changes in the work rules that survived the Award? All parties agree that negotiation during the pendency of Award 282 was permissible, but the carriers say it was not obligatory. In our opinion, however, bargaining during the pendency of the Award 282 was not merely a matter for the whim of the parties but was to be governed by provisions of the Railway Labor Act, and these provisions remained in effect during the life of the Award for purposes of regulating the responsibilities of the parties to bargain concerning changes proposed to become effective *after* the expiration of the Award.

The principles and objectives underlying Public Law 88-108 reveal that Congress placed a high premium on the opportunity for continued collective bargaining during the life of the Award, in the hope and expectation, apparently shared at that time by the parties themselves, that the unions and carriers would themselves work out a long range solution to these sensitive problems by the traditional devices of collective bargaining. This special statute served to give the Nation a temporary respite from the threat of a disastrous national rail strike by forbidding for two years any unilateral changes or resort to self-help and imposing instead interim rules to cover the situation. But as we have seen, both the statute and the

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[18] *See* note 10 *supra*.

Award expressly contemplated that the parties were free to alter or extend the rules fixed by Award.[19]

Public Law 88-108 established a procedure for formulating rules to govern for up to two years, in the absence of a negotiated pact. This did not displace the otherwise applicable provisions of the Railway Labor Act on the duty to bargain on changes proposed to become effective subsequent to the two-year period. President Kennedy in his message to Congress expressed the desire that the parties continue to confer on the ultimate resolution of their disputes.[20] A chief spokesman for the carriers, Mr. J. E. Wolfe,[21] assured the Senate Committee that the carriers understood that the Administration's bill "imposes a duty on the parties to attempt to settle their differences" and would "protect the public interest as a result of the establishment of these interim rules for a period of 2 years or less while the parties undertake, through collective bargaining, to bring about a more permanent solution of the problems."[22] We are aware that in the reshaping of the measure the duty to bargain on the work rules was not expressly spelled out, but the plan was surely retained. Indeed the preambles of both measures expressly and unequivocally proclaimed the care taken to select a system which solved the immediate emergency "in a manner which preserves and prefers solutions reached through collective bargaining." Changes were made by the Congress—notably the substitution of an independent *ad hoc* board for the Interstate Commerce Commission as the arbiter for the dispute.[23] There was not a breath of a suggestion, however, that Congress intended to remove

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[19] Indeed, on the crew consist issue, Section III.A(1) of the Award remanded the dispute to local properties "for negotiation", and only if these further efforts to reach a settlement proved pointless, were special boards of adjustment to be convened to fix the temporary rules.

[20] *See Message from the President, supra* note 7, at 6-8.

[21] Chairman of the National Railway Labor Conference, an organization whose members conduct about ninety percent of all railway operations in the United States.

[22] *Hearings on S.J.Res. 102, Before the Senate Comm. on Commerce,* 88th Cong., 1st Sess., ser. 24, at 375 (1963).

[23] The Supreme Court referred to this substitution as the only "significant change" from the Administration bill. Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

or even downgrade the policy that the parties themselves should confer in order to reach long-range solutions through collective bargaining and agreement.

The carriers contend that all this means only that the parties were free to bargain during the Award if they wished, or even that they were encouraged to do so, but that for the two-year period the special act repealed pro tanto and by implication the duty under the Railway Labor Act to confer on proposed rule changes. We disagree. In our view Public Law 88-108 was intended to work the minimum disruption of permanent railroad legislation and normal collective bargaining. The only disruption wrought, the only "repeal by implication", was that which necessarily accompanied the objective of staving off a cataclysmic strike by imposing a temporary settlement. We detect no glimmer of an intimation that the carriers were authorized to regard this as a two year hiatus in their obligation to bargain. Rather, we find much to militate against such a construction.

It is notable that the parties to this dispute had already agreed to submit their controversy to arbitration. They stumbled over procedural details. Congress viewed its role primarily as draftsmen of the specifics of an arbitration agreement to which the carriers and unions had already agreed in principle.[24] The statute in Section 4, the Award in Part IV, and the reports of both congressional committees carefully specified that the effective duration of the Award was limited to no more than two years, unless extended by stipulation, in order to restrict the "scope and impact" of the statute.[25]

In essence then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written

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[24] *See* S. Rep. No. 459, 88th Cong., 1st Sess. 9 (1963); H.R. Rep. No. 713, 88th Cong., 1st Sess. 12-13 (1963); Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R., 225 F. Supp. 11, 18 (D.D.C.), *aff'd*, 118 U.S.App.D.C. 100, 331 F. 2d 1020, *cert. denied*, 377 U.S. 918 (1964).

[25] S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963); *see* H.R. Rep. No. 713, 88th Cong., 1st Sess. 14-15 (1963).

the arbitration agreement. We are not concerned here with customary adjudicatory or grievance arbitration. Although so-called "legislative" arbitration agreements are relatively infrequent they are not unknown. Under such agreements, prospective rules and working conditions, instead of being determined by agreement of the union and employer, as is customary, are determined by an arbitrator to whom the function is delegated.[26] Such a determination by arbitration is equivalent to a determination by agreement insofar as the rights and duties of the parties concerning future modification are concerned. An arbitration award does not operate to "prevent the [parties] from seeking through negotiations under the procedures provided for by the Railway Labor Act or otherwise a new agreement . . . covering the rules. . . ."[27]

Responsible conduct of the process of collective bargaining, for consideration of proposals to modify work rules established by an agreement or award of limited duration, embraces conference and consultation prior to the termination date. This is the way responsible businessmen deal with each other when they plan to continue a business relationship—for example, in negotiating on a contract or lease before its expiration date. This is the way responsible employers and unions implement the collective bargaining process, and respond to calls for change. And this is the way railroads and railroad unions must respond under the mandate of the Railway Labor Act.

The purpose of a Section 6 notice is "to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract."[28] No rigid form for these notices is defined in the statute.[29] All that is specified is thirty days written notice of a proposed change. The Act requires that within ten days a time and place for conference be

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[26] *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 30-47 (rev. ed. 1960).

[27] Sheehy, Ch.J., in Brotherhood of Railroad Trainmen v. St. Louis Sw. Ry., 220 F. Supp. 319, 326 (E.D. Tex. 1963).

[28] McMullans v. Kansas, O. & G. Ry., 229 F. 2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956).

[29] *See* Detroit & T.S.L.R.R. v. Brotherhood of Locomotive Firemen, 357 F. 2d 152, 153 (6th Cir. 1966).

set, and that the first conference be held within the 30-day period.

To recapitulate, the Railway Labor Act not only requires railway employers and unions to confer and bargain on work rules established by agreements or awards having a fixed expiration date when one party wants to change the rules, but permits the statutory machinery to be invoked *prior* to expiration in order to seek an agreement on changes to become effective on or after expiration.

If an agreement (or award) contains a fixed expiration date, rather than the common indefinite or automatic self-renewal term, then the notice must indicate a proposed effective date for changes that is not only at least thirty days after the notice, but also a time after the outstanding agreement or award expires. Nothing in the Railway Labor Act, or the scheme of Public Law 88-108, forbids service of a notice more than thirty days before suggested rules would or could be effective, and nothing relieves the recipient from the duty to commence bargaining at that earlier stage.

The carriers seek to buttress their claim of pro tanto repeal by implication by arguing that it can hardly be supposed that Congress intended to permit the unions to ready themselves to strike on January 25, 1966. The only forecast of that day we can find in the legislative history is the assumption that it would be preceded by an agreement of the parties. And that in turn, in our view, assumes that responsible collective bargaining would have been in train some time prior to the expiration date. If we turn from speculation about legislative intent to the realities of the Railway Labor Act, we are aware that the conferences triggered by Section 6 notices are typically the beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing, either party can invoke the services of the National Mediation Board. While negotiations continue or the Board has jurisdiction, no self-help is permitted. The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. Only when all these steps have been exhausted are the parties permitted

to act unilaterally. "For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."[30]

We do not say that the time of service of notice is completely irrelevant to the duties of the parties. It may be that a notice served the day after the Award would betoken bad faith to the point of vitiating its validity. We shall have occasion to point out that certain union notices were defective for analogous reasons. But the mere fact that the union notices were served prior to January 25, 1966, did not relieve the carriers of their duty to confer and bargain prior to January 25, 1966. We are not considering a case where the railroads, while conceding that the unions had a right to begin bargaining prior to the expiration date, responded that the particular notice came too early, perhaps on the ground that it did not permit enough experience under the existing rules to spawn realistic and informed bargaining. In the case before us the carriers flatly refused to engage in any statutory bargaining whatever prior to the expiration date. Except in the case of objectionable union proposals discussed below, the carriers before us must be held to have breached their statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules. The decree of the District Court embodies a contrary declaration, and to that extent it is reversed.

We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. Once they have been frustrated, one side to the dispute can move to the next tier of procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. The carriers have forsaken their right to insist on conferences by their refusal to respect effective Section 6 notices. The standard for good faith bargaining is quite

[30] Brotherhood of Railway Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966). See also Farmer, *Compulsory Arbitration—A Management Lawyer's View*, 51 VA. L. REV. 396, 401-02 (1965).

liberal. Certainly it does not compel agreement. Judge Bryan, after the most careful analysis, formulated the frequently quoted standard that the—

> requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all. *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F.Supp. 777, 794 (S.D.N.Y. 1958).

Applying such a test, the carriers have breached their duty to enter negotiations in good faith, for a refusal to bargain on an erroneous premise of law is no excuse.[31]

IV

Although the statutory duty to bargain continued during the limited duration award, it was not unaffected by the temporary statute and the arbitration award. Their emanations do affect the conceptions of bargaining in good faith, pursuant to a good faith notice, inherent in the scheme of the Railway Labor Act. We shall develop our specific rulings by considering the three groups of unions in chronological order by dates of notices.

A. Order of Railway Conductors and Brakemen (ORCB)

One group of cases before us, Nos. 20158 and 20191, concerns the Order of Railway Conductors and Brakemen (ORCB).[32] On Monday March 23, 1965, that union, expressly relying on the provisions of the Railway Labor Act, served notices on the carriers which proposed a rule requiring not less than one conductor and two brakemen on all classes of road train service thirty days after

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[31] *See, e.g.*, Order of Railroad Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330 (1960). We do not consider attempts to obtain new work rules incompatible with those imposed by the Award or with the report of the Presidential Emergency Board reflective of bad faith on the part of the unions. Compare Pullman Co. v. Order of Railway Conductors, 316 F. 2d 556 (7th Cir.), *cert. denied*, 375 U.S. 820 (1963).

[32] The District Opinion is reported: Akron & B. Belt R.R. v. Order of Railway Conductors, 253 F. Supp. 538 (D.D.C. 1966).

notice. That date was, obviously, a full nine months prior to the expiration date of the Award. The carriers considered the notices premature and refused to concede any obligation to bargain on the merits of the proposals.[33] ORCB invoked the services of the National Mediation Board, which docketed the case, but suspended action when the District Court held the notices premature.

We think it manifest that the proposal to scrap the Award during its lifetime could be broached to the carriers to see if they were interested but could not be presented to them as a subject of bargaining that was mandatory under a statutory obligation. We agree with Judge Bryan's approach that the collective bargaining system of the Railway Labor Act subsumes and presupposes a bargaining "in good faith."[34] The issue of good faith is interlaced with "bargainability"—a term of art which means not only capable of being bargained but also a proper subject of mandatory bargaining. We have already held that the carriers were in bad faith in asserting that they had no legal obligation to bargain during the life of the Award. They had an obligation, we think, to bargain about changes to become effective with the expiration of the Award. But we also think that they had no obligation to bargain about a proposal to make changes during the life of the Award. Such an obligation would be inconsistent with an inherent and essential element of Public Law 88-108, which was intended to promote long range solutions through collective bargaining by removing the need to bargain over immediate crises.

The ORCB argues that the carrier's duty to bargain is reaffirmed by Section III of the award of Board 282 which directs the parties to resume local negotiations on crew consist. We agree that the unions could have called on the carriers to negotiate pursuant to the Award. But this is entirely different from the statutory duty imposed by Section 6 of the Railway Labor Act, upon which the union

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[33] The carriers lodged a further objection on the ground that the ORCB is not the certified bargaining representative of most of the road brakemen directly affected by the notices. Compare Southern Pac. Co. v. Switchmen's Union of North America, 356 F. 2d 332, 335 (9th Cir. 1965). The parties have stipulated this issue out of these proceedings.

[34] *See* American Airlines Inc. v. Air Line Pilots Ass'n, *supra*, 169 F. Supp. at 793-95.

purported to rely. The Award machinery was essentially different from and displaced the Railway Labor Act concerning rules effective during the life of the Award. This is demonstrable from the provision of the Award that specified that if the parties were unable to arrive at an agreement their dispute should be referred to a local arbitration tribunal. This is, of course, entirely different from and supersedes the basic structure of the Railway Labor Act which provides for compulsory arbitration only for minor disputes, and contemplates mediation or voluntary arbitration where agreement has not settled "major disputes," i.e. disputes relating to changes in rates of pay, rules or working conditions.[35] In this context, we agree that these notices were premature.

B. Brotherhood of Railroad Trainmen (BRT)

In another group of cases (Nos. 20152, 20172, 20229 and 20249) we are concerned with the Brotherhood of Railroad Trainmen (BRT).[36]

On June 30, 1965, BRT served a notice proposing that beginning January 26, 1966 (unquestionably after the termination of the Award) a new work rule be inserted in the agreements between the BRT and the carriers requiring that not less than two, or in some cases three, brakemen be included in the "crew consist" of the carrier's runs. In most instances the carriers in turn served counter-proposals with respect to crew consist rules, although they took the formal position that the BRT notices were premature and that during the life of the Award the only proper procedure for instigating crew consist changes was in accordance with Part A(3) of Section III of Award 282.[37]

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[35] *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-28 (1945).

[36] These are appeals from judgments following the opinions in Akron & B. Belt R.R. v. Brotherhood Railroad Trainmen, 250 F. Supp. 691, 252 F. Supp. 207, and 254 F. Supp. 306 (D.D.C. 1966).

The Switchmen's Union of North America (SUNA) is also a party in Appeals 20152 and 20172.

[37] "Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen. . . . The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice."

The carriers' denial of an obligation to bargain with the BRT was essentially based on the contention of prematurity which we have already considered and rejected.

We turn to the carriers' current argument that Section 6 of the Railway Labor Act cannot meaningfully impose a duty to bargain during the life of the Award about changes following its expiration, since this would undercut bargaining pursuant to the Award concerning work rules during the life of the Award. We see no inherent inconsistency such as we found in discussion of the ORCB proposals. Bargaining and arbitration for rules to be in effect for a two-year period are not inherently negatived by tandem bargaining under a different system over long-range rules. Conflict in scheduling might be a temporary problem, but it could hardly dignify a complete denial of a duty to bargain over the ultimate and dominant issues.

C. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The third major group of cases, Nos. 20192, 20193, 20215 and 20216, involves the Brotherhood of Locomotive Firemen and Enginemen (BLFE).[38]

In November 1965 this union served notices to take effect at 12:01 a.m. on March 31, 1966, the day after the Award, as extended by stipulation, was to expire. There were three notices, each made expressly pursuant to the Railway Labor Act. Notice No. 1 related to the types of engine services on which the employment of firemen would be required, and would have pegged employment at a level of 6000 jobs below the terms of the National Diesel Agreement, but far above the level provided by Award 282. Notice No. 2 provided for compensation to firemen who had been relocated, severed, or otherwise disadvantaged by the operation of Award 282. By stipulation of the parties we need not here consider Notice No. 3, which set out a training program for apprentices. The carriers contended that all such notices were premature, and further contended that the second and third were not even proper subjects of collective bargaining. Several

[38] These are appeals from judgments following the opinion in Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 253 F. Supp. 682 (D.D.C. 1966).

abortive conferences were held, but the carriers resisted any attempts to reach the merits of the proposed rules.

In the BLFE consolidated declaratory judgment actions, the District Court agreed with the carriers on the major points, holding Notices 1 and 2 not only premature but also *non-bargainable* although the carriers had not even challenged the bargainability of the first notice. The court's interjection seems not only to have provided an additional reason for holding that the carriers had not violated a legal obligation in the past, but also to have prompted the carriers to seek restriction of their obligation to bargain in the future.

With the controversy thus expanded when there was already uncertainty as to the exact legal rights of the parties, the issue became the subject of a legal ruling. Since the genie can not be put back into the bottle, we turn to consideration of the soundness of the determination by the District Court, and we conclude that it was not a correct statement of applicable legal doctrine.

The District Court reasoned that—

> the employees may not in the guise of serving notices under Section 6 of the Railway Labor Act, seek to abrogate or set aside the Award. It must be borne in mind that the Award is the result of a compulsory arbitration conducted under a mandate of Congress and has the stamp of judicial approval in the form of a judgment in a proceeding to impeach it. Neither a carrier, nor a union may institute proceedings, directly or indirectly, to set aside any provision of the Award, or the operations or activities that have taken place under it or the results that have been achieved.[39]

Since these notices were found not to "relate to matters subject to collective bargaining under the statute," the court declared that they "need not be complied with." 253 F.Supp. at 689. We disagree and are of the view that Congress did not intend that either Public Law 88-108 or Award 282 would permanently excise from the scope of

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[39] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F. Supp. at 687.

collective bargaining any proposals that otherwise would have been lawful under the Railway Labor Act. Applying this standard, we find that Notice No. 1 falls within the realm of proper collective bargaining, but Notice No. 2 does not.

We begin our reasons for reaching this conclusion with a review of the principles surrounding disputes about bargainability. The settled tradition under the Railway Labor Act reveals a firm obligation on the railroads and their employees to negotiate about changes in working conditions suggested by one side or the other. In the landmark case of *Virginian Ry.* v. *System Federation No. 40, Railway Employees Dep't*, 300 U.S. 515, 548 (1937),[40] Justice Stone held that while the Act does not compel agreement, it does demand those preliminary steps, triggered by a Section 6 notice, without which no agreement could be reached. The minimum requirements are that the employer at least meet with the union to listen to its proposals and to make a reasonable effort to achieve an accord.

The subjects for mandatory mutual consideration are defined in Section 6 merely by reference to "rates of pay, rules, or working conditions."[41] But the courts have ratified the practice of the industry so that the duty to bargain "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States."[42] That is, "what carriers must legally bargain about is affected by what is in fact bargained about in the railroad world."[43]

The scope of bargainability is extremely broad. The recent guidepost opinion in *Order of Railroad Telegraphers* v. *Chicago & Nw. Ry.*, *supra* note 31, 362 U.S. at 338 (1960) states:

> In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting

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[40] *Accord*, Elgin, J. & E. Ry. v. Burley, *supra* note 35, 325 U.S. at 724-25 (1945).

[41] *See also* 45 U.S.C. § 152, Seventh (1964).

[42] Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346 (1944).

[43] United Indus. Workers of Seafarers Int'l Union v. Board of Trustees of Galveston Wharves, 351 F. 2d 183, 191 (5th Cir. 1965).

railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.[44]

The court upheld the right to strike to compel bargaining on a proposed work rule change to prevent the carrier from abolishing positions in existence before a certain date. The court rejected the carrier's contention that the proposal was not part of a legitimate "labor dispute" because it sought to perpetuate "wasteful" and "unnecessary" jobs.

The scope of "work rules" discussed by railroads and unions over the past century, including the use of firemen and the manning of trains,[45] has greatly exceeded what a layman might expect the term to include. Bargaining in the rail industry has comprehended fields frequently reserved to management in other industrial contexts. Not until the railroads began to experience the pressure of advancing technology and vigorous competition from other modes of transportation after the Second World War was there any suggestion that some questions of mutual interest might be beyond the pale of required bargaining. Increasingly, the roads have come to use the allegation of non-bargainability, and have sought judicial rulings to protect managerial discretion.[46] Rarely have

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[44] *Cf.* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 209-15 (1964).

[45] *See* H.R. Rep. No. 713, 88th Cong., 1st Sess. 6 (1963); Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration,* 14 DE PAUL L. REV. 115, 119-20 (1964). *See also* Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 429.

[46] See the excellent discussion in Weber, *Public Policy and the Scope of Collective Bargaining,* 13 LAB. L.J. 49 (1962).

the courts sanctioned this technique, and recent pronouncements do not augur well for its encouragement.

This setting bids us be chary of the conclusion of the District Court that there was no bargainability in Notice No. 1 which proposed that for the future the parties establish work rules different from those prescribed by the Award for a two-year period. The court stated that Notice No. 1 "demands the restoration of firemen on those runs for which Award 282 expressly held firemen were unnecessary. Obviously, compliance with this notice would be a consent to abrogate and do away with the outcome of the arbitration." [47] The District Court gave no clue as to how in its opinion a Section 6 notice could validly propose changes in the work rules established by the Award, by what method, and to what extent.

In our view its conclusion was erroneous. The crisis conditions of 1963 evoked an unusual response from Congress, but one not intended to displace totally the framework of labor relations law and practice in the field. The phrasing of Public Law 88-108 and the reports that accompanied it make clear that Congress in its controlled response did not intend to effect a permanent alteration in development of collective bargaining. The preamble set the tone of the statute, declaring that "it is desirable to achieve [the protection of the national interest] in a manner which preserves and prefers solutions reached through collective bargaining. . . ." According to Section 8, the statute expired of its own terms one-hundred and eighty days after enactment. The Award of the Arbitration Board, by virtue of Section 4, could not "exceed two years from the date the award takes effect, unless the parties agree otherwise." Section IV of the Award itself reiterated the limited duration of the terms imposed and specified it would be in force for two years "unless the parties agree otherwise."

This dual theme of limited survival and contractual freedom infuses a proper resolution of this case, and does so with a spirit that is frustrated by the District Court's conclusions of non-bargainability (and indeed of

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[47] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F. Supp. at 688.

prematurity). In providing in Section 3 of the law that the Award would be "binding on both the carrier and organization parties" and constitute a "complete and final disposition" of the major issues, Congress meant only that the Board's conclusions were to have the status of arbitration awards in the classic sense, not merely of mediation suggestions or fact-finding as in the ordinary major dispute under the Railway Labor Act. But Congress contemplated and intended that the parties could continue to work out a settlement different from that imposed by the Board to be effective for a limited two-year period. In submitting the Administration draft to Congress, "President Kennedy repeatedly emphasized to the Congress his hope that the dispute could eventually be settled by collective bargaining." *Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R.R., supra* note 4, 382 U.S. at 431. The President "expressed no desire to have Congress pass a law that would finally and completely dispose of the problem," observing that it would be "'wholly inappropriate to make general and permanent changes in our labor relations statutes. . . .'" *Id.* at 432. And the Congress "enacted the bill proposed by the President" with but "one significant change" not relevant here. *Ibid.*

Congress emphasized in unambiguous terms that the parties were not to be locked in by the terms of the Award on the firemen and crew consist issues:

> It should be especially noted that, although the joint resolution provides for arbitration on these two issues, the parties may still bargain collectively on these issues, and resolve them among themselves. This process may take place before the arbitration board is established; after the board has initiated its proceedings; and may also take place after the board has made an award. By agreement, the parties may make the appointment of the board unnecessary; may make the decision of the board unnecessary; *and may supersede the decision of the board—all through collective bargaining.* H.R. Rep. No. 713, 88th Cong., 1st Sess. 13 (1963). (Emphasis added.)

We find it impossible to accommodate the operative language and animating philosophy of Public Law 88-108 with the District Court's holding that Notice No. 1 was non-bargainable. The carriers argue now that the District Court did not foreclose all possibility of altering the rules imposed by the Board, but meant only to vindicate its efforts by precluding return to the status quo ante. Even if we agreed that the BLFE's Notice No. 1 would have that effect,[48] nothing we detect forbids proposing just such a complete regression. At least, we hold that under the Railway Labor Act, and after taking into account such qualification of that law as is fairly implied from Public Law 88-108, the BLFE could legitimately require that the carriers negotiate about these proposals for work rules to be operative in the future.

Nothing compels the carriers to accede totally to changes proposed in Notice No. 1, and indeed in light of the realities of collective bargaining it is unlikely that the BLFE expects to insist on complete acceptance of its suggestions. But certainly there was no disability prohibiting the opener that the BLFE included in its first notice.

Notice No. 2, however, falls in a different category. It did not propose certain rule changes to govern the future operation of the railroads. It was aimed directly and undeniably at vitiating the Award of the Arbitration Board, an Award that has long since received judicial confirmance and been fully implemented by the parties. Although Notice No. 2 expressly refers to Section 6 of the Railway Labor Act, the notice on its face demonstrates the irrelevance of Section 6, and the "major disputes" provisions of the Railway Labor Act in general.

Notice No. 2 explicitly proposed that "employees whose employment and seniority were terminated by the application or misapplication of the Award of Arbitration Board 282 will, on [the expiration of the Award as extended by stipulation], be recalled and restored to the seniority roster and employed with their original seniority date and used as firemen (helpers)...." In subsequent sections,

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[48] We note, however, that apparently 6000 fewer firemen would have been required under the proposed rules than the National Diesel Agreement had provided.

the notice proposed that employees terminated in the course of implementing Award 282 be reimbursed for monetary loss due to the termination and deprivation of seniority, including expenses incurred for meals, travel, lodging, and change of residence when relocating for other assignments.

These proposals relate to alleged past grievances. We are concerned here with bargainability, and instinct in the essence of collective bargaining is a notion of mutuality, that if a subject is brought up each side has at least the authority both to offer and to concede.

What is the status of the union concerning the subject it proposed for bargaining in Notice No. 21. We turn to *Elgin, J. & E. Ry.* v. *Burley, supra* note 35, 325 U.S. at 739:

> To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a preexisting collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.
>
> But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances.

The Court held that a union had no lawful authority to bargain for some of its members in settling claims they asserted against the railroad arising from the application of new work rules. The court observed that the railroad

was not entitled to assume from the union's status as bargaining agent that it had the right to settle claims for past grievances, and that any agreements reached were without legal significance.

This analysis has an immediate bearing on our situation. The BLFE proposed that the carriers jettison the rights that had accrued to them under the Award, for the Notice by its terms is limited to rehiring and reimbursing those employees terminated in implementing Award 282. If Award 282 meant anything it provided the sanction of Congress for the railroads' authority to discharge thousands of firemen. This permission was sharply narrowed by stringent protective provisions under which severed employees have already received many millions of dollars in benefits. The rights to these payments vested when the employees were discharged pursuant to the Award. The BLFE Notice proposed that the carriers renounce their vested rights. But the bargainability of this subject matter as a proposal for a change in "work rules" is undercut by the fact that the *Elgin* case squarely denies the BLFE any warrant in law to "bargain" over any possible concession on the employee's side to make a refund, or even partial refund, of any severance benefits already vested or paid. Clearly a proposal that cannot lawfully be adopted is non-bargainable.[49] Since the union could not bargain away any part of the rights that accrued to employees under the Award, it could not compel the railroads to bargain on a proposal that they surrender rights that accrued to the carriers under the Award, which defined and limited the liability of the carriers arising from changes made in accordance with the Award.

In Notice No. 2 the union claimed there had been misapplication of the award. As to this it suffices to point out that Section 8 of the Railway Labor Act[50] and Section 4 of Public Law 88-108 permit the union to bring forward, questions of interpretation as to the scope and applicability of the Award for resolution by Board 282.[51] But

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[49] *See* Southern Pac. Co. v. Switchmen's Union of North America, *supra* note 33, 356 F. 2d at 334-35.

[50] 45 U.S.C. § 158(m) (1964).

[51] *See* Brotherhood of Railroad Trainmen v. Terminal R.R. Ass'n, — U.S.App.D.C. —, — F. 2d — (No. 20135), decided this day.

these would not be comprehended by Section 6 of the Railway Labor Act, governing proposed changes in work rules, classified as major disputes.[52] The rest of Notice No. 2 is inherently an attack on the fairness of the Award —and that is not bargainable under Section 6 consistently with the purpose of Public Law 88-108, and the Award thereunder and its judicial confirmance.

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It is our hope and contemplation that any further litigation will be conducted with a fresh outlook. The halls of justice should not be an arena where gladiators are spurred on in desperate combat. They provide a forum where legal disputes can be settled, with a minimum of rancor, so as to further the Congressional objective of agreement and, if possible, harmony between carriers and unions.[53]

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[52] The BLFE contends in its brief that there is nothing wrong with retroactive contract proposals and agreements, and suggests that they are used frequently in industrial relations. Whatever may be the general practice, and regardless of what other provisions of the Railway Labor Act may require, there is no duty to bargain collectively over the settlement of past grievances that is imposed by Section 6.

[53] This court's opinions in the instant cases will undoubtedly have bearing on others arising in one way or other out of Award 282.

Before the present division are ten cases, Nos. 20152, 20158, 20172, 20191, 20192, 20193, 20215, 20216, 20229 and 20249.

Before the instant division also is No. 20316, decided today.

Previously argued before Judges Bastian, Burger and Wright are five cases, Nos. 19867, 20003, 20004, 20212 and 20213.

Case No. 20135, decided today, came before Chief Judge Bazelon, Senior Circuit Judge Edgerton and Circuit Judge Coffin, (of the First Circuit sitting by designation).

Hitherto in the District Court, cases involving the railway work rules disputes have been referred to a single District Judge. The fact that we have differed from him in some aspects of relief granted or of the basis of rulings should not be permitted to obscure our appreciation for the prodigious effort he has made in response to so difficult an assignment, and for the commendable manner in which he has approached so many novel and complex questions.

In today's text we have undertaken definition of the basic legal principles applicable to future consideration of the issues. It would seem that sound judicial administration of the District Court's business will be served by rotation of this assignment at this juncture. We have in mind avoidance of further burdening of this District Judge and the broadening of appli-

The parties are directed to submit within 10 days a proposed judgment, and to confer and endeavor to agree thereon. At that time the parties may also request supplemental rulings on any matters that have not been discussed in this opinion.

*Affirmed in part, reversed in part.**

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cation of pertinent judicial expertise and exposure in meeting our common problems in this area. So it is that we have ourselves achieved some distribution of the workload, and we regretfully assume that there may yet be heavy demands on judicial manpower in the District Court by reason of railroad work rules controversies.

* Appendix omitted.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,152, 20,158, 20,172, 20,191, 20,192, 20,193, 20,215, 20,216, 20,229, 20,249

Appeals from the United States District Court for the District of Columbia

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss,* were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge,* BASTIAN, *Senior Circuit Judge,* and LEVENTHAL, *Circuit Judge.*

SUPPLEMENTAL OPINION

[Filed July 31, 1967]

LEVENTHAL, *Circuit Judge:* On May 12, 1967, this court released its opinion disposing of many of the legal questions arising from the railway work rules disputes and the compulsory arbitration statute passed by Congress in 1963 to handle the controversies. Because of the number and complexity of the issues, we directed the parties to confer in an effort to propose a judgment embodying our rulings, and invited them to request supplemental rulings on any points not explicitly covered by our opinion.

The parties have submitted numerous requests for supplemental rulings, for reconsideration, and for clarification.

I *The New Plateau Work Rules Continuing in Effect*

A. Brotherhood of Railroad Trainmen (BRT)

The carriers contend that our "new plateau" rationale, holding that the substantive terms effected by Award 282 continue in force after the formal expiration date of the Award until changed pursuant to the Railway Labor Act, logically requires reversal of the District Court's ruling that the procedures established by Award 282 for special arbitration awards on the trainmen issue lapsed at the termination of the Award. We disagree.

Our decision rests on an accommodation of the sometimes divergent directives of Public Law 88-108, Award 282, and the Railway Labor Act. Throughout, our touchstone has been our understanding of dominant Congressional intention. We viewed Congressional intervention in 1963 as reflecting a sensitivity to the dangers of imposing drastic changes on the pattern of railway labor collective bargaining.

The point is simply this: We think Congress meant that changes in substantive work rules issuing forth after the expiration of Award 282 should not be wrought by the compulsory edict of a board, but should either be reached by agreement of the parties or should be born out of their actions under the Railway Labor Act, an act which regulates their conduct of bargaining so as to promote the possibility of agreement, with the assistance of the National Mediation Board or other special boards.

This dominant Congressional intention means that a difference must be drawn between those actions of Board 282 and its agents prior to the expiration date of Award 282 which effected changes in substantive work rules, and those actions which merely constituted issuance of procedures for promulgating future changes in substantive work rules. The completed changes in substantive work rules continue on—unless and until changed again in accordance with the Railway Labor Act. But there is no continuance of what are in effect only procedures for issuing future changes in substantive work rules.

Those procedures constituted a special mechanism for making changes by award, and were intended to have only

a two-year life. Upon the expiration of the two-year period the special machinery was exhausted and in the absence of agreement only the system of the Railway Labor Act was available for future changes in substantive work rules. Consequently, in the absence of ratification by agreement of the parties, a local adjustment board had no independent legal authority that would permit it to achieve an alteration in substantive work rules subsequent to the expiration of the two-year period.

B. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The parties are in disagreement as to the import for the Firemen of our ruling as to the Trainmen, a ruling announced in our May 12 opinion and adhered to on reconsideration for the reasons noted above.

On the firemen issue, Board 282 decided that most firemen could be dispensed with for other than steam power engines. It developed a procedure permitting the "blanking" of firemen positions as follows: Each carrier could list those engine crews on which it thought firemen unnecessary for reasons of safety or workload. These positions could then be blanked, except that each local union chairman was given the right within 30 days of receipt of the carrier's list to designate up to ten percent of these crews as requiring continued employment of firemen. The Award refers to this right to designation as based upon considerations of safety, undue work burden and adequate and safe service to the public, but provided that the designation shall not be subject to challenge or review. This procedure was designed to take place at three month intervals.

A dispute arose when it came time to decide what happened to this procedure, and the results it had reaped, when Award 282 expired.

The carriers insisted that when Award 282 expired the procedures continued in effect as part of the new plateau of work rules, and constituted a continuing mechanism for reducing the employment of firemen unless and until changed in accordance with Section 6 of the Railway Labor Act. The BLFE argued both that this procedure passed out of existence when the Award terminated, and that the

changes it had effected lapsed, so that positions blanked during the life of the Award were resurrected. The District Court ruled that a "new plateau" had been created that preserved what had been accomplished by the carriers under the Award in reducing firemen's positions, but held that the carriers could no longer resort to the machinery created by the Award to make further job cuts. The District Court concluded, however, that the carriers were prevented only from taking "affirmative acts" in reliance on the Award, but explained that this did not prevent the carriers from refusing to fill vacancies resulting from natural attrition. The underlying premise of that court's decision was that Award 282 superseded the requirements of the National Diesel Agreement which would otherwise demand the use of firemen on all locomotives.

As set forth in our May 12 opinion, this court has rejected, though for somewhat different reasons, the contention of the BLFE that after March 30, 1966, the *status quo ante* compulsory arbitration was automatically restored. While we explicitly ruled that the procedure created by the Board for making new crew consist rules expired when the Award did, we did not previously examine the problem presented in the firemen context.

The BLFE insists that there is no tenable distinction whereby firemen should be subject to continuing reductions under the Award though trainmen are not similarly affected. The carriers concede that it is difficult to distinguish the two situations, but suggest that the Award might be viewed as merely setting forth a procedure for crew consist changes but as directly affecting the firemen rules.

Once again we find both parties somewhat out of alignment with our basic premises. We have endeavored to make it clear that nothing of the Award survived its expiration date. It is the work rules resulting from the Award that endure, by virtue of the Railway Labor Act; they are deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the Railway Labor Act unless and until changed in accordance with that statute. We must therefore discern what "work rules" were put into effect under and prior to the expiration of Award 282.

The Award did not dispense with the use of firemen. It began by continuing in force all "agreements, rules, regulations, interpretations, and practices, however established," except as modified by the Award. The Award provided procedures whereby the carriers could mark firemen jobs for extinction, and also established a reciprocal power in the local BLFE chairman to immunize from elimination ten percent of the crews listed. The Opinion of the Neutral Members of Board 282 makes abundantly clear that the Board recognized that the Award had the effect only of sanctioning a procedure of limited duration for accomplishing a reduction in crew consist and the use of firemen. The Board explained that it was conscious that the immediate impact of the Award might be small, but that this was a deliberate choice reflecting concern for the human factor in the equation and the goal that the Award would establish some principles that could contribute to a final solution to the problems:

> The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small. *Opinion of Neutral Members,* 41 LAB. ARB. 680, 681.

The Board members themselves characterized what they did as having "established a *procedure* for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination." (p. 681) (Emphasis added). In explaining why the Award provided that the union could insist on saving ten percent of the jobs marked for elimination, the Neutral Members reasoned that this procedure would obviate the possibility of objections, based on safety or convenience, to individual proposals for job reduction. The underlying premise, as explicated by the Board, was that the Award would be able to authorize such reductions only during two years, and unless an efficient procedure were provided for making specific decisions "the likelihood of reducing [the number of disputes over individual jobs] significantly in a two-year period would not be very great." (p. 690). Because of the two-year limitation on the Award, the Board doubted that any standards it might

prescribe could be applied in particular disputes "in sufficient time to yield any significant results." (p. 690).

As the event turned out the carriers used the Award's procedures to terminate many more firemen jobs than the Board predicted.[1] The Neutral Members' underestimate does not undercut but rather underlines the view that the mechanics for reduction in firemen jobs were procedures of necessarily limited duration, rather than work rules with continuing vitality.

Our conclusion is that the provisions in the Award for establishing new firemen levels did not constitute "work rules" in the classic sense, as we have used and applied that term, but instead are more accurately described as procedures for establishing new work rules. The history of labor relations agreements in this industry reveals that the manning work rules were expressed in terms of ultimate results, like one-conductor-and-three-brakemen, or firemen-required-on-all-freight-locomotives, and were not formulated in terms of a methodological approach. This practical construction of the concept of work rules is reinforced by the Board's expressions treating the mechanics of lists and designations as procedures. Accordingly, for purposes of determining what "work rules" were in force on the last day of the life of Award 282, we do not consider the procedures provided by the Award for changing job requirements as being themselves part of the substantive "work rules." These procedures, like the procedures for changing substantive work rules for crew consist of trainmen, had no effectiveness after the expiration of the Award.

This construction also gives what we consider the

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[1] In the course of Congressional testimony, Chairman Ralph Seward of Board 282 and Assistant Secretary of Labor James Reynolds indicated that their original expectation was that the procedures would lead to a reduction of about 5500 jobs, rather than the 18000 the carriers succeeded in blanking. *See Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 1st Sess., ser. 89-45 at 363-64, 465-66 (1965). And according to Senator McGee, the number of firemen eliminated also exceeded the expectations of "Members of the U.S. Senate." *Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 2d Sess., ser. 89-56, at 1030 (1966).

appropriate effect to the undeniably significant provisions in Public Law 88-108 and Award 282 that limited the effectiveness of the Award to two years. Since the Award did not become effective for sixty days after filing, the parties had more than two full years to plan its implementation The pre-existing work rules, contained in the National Diesel Agreement of 1950, stipulated that "A fireman, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives." Award 282 continued this requirement (and any others stemming from agreement or practice), until changed in accordance with the Award. For two years plus, the carriers had the machinery for proposing, at three month intervals, the crews that they thought could safely and efficiently dispense with firemen positions. The fruits of these notices and negotiations, after adjustment for the Union's ten percent retention, effected what must be regarded as new "rules" applicable to the particular runs involved. But when the Award expired, so did the procedures it suggested. What survives is the complex of work rules in force on the last day prescribing the substantive terms that controlled the use of firemen on individual runs.

In consequence, a carrier is not only prevented from taking "affirmative acts" under the Award to reduce the use of firemen, as the District Court properly held, but also, if the carrier was required to keep a fireman on a particular crew as of the last day of the Award, it cannot thereafter change the work rule by discontinuing that position, except by agreement or in accordance with Section 6. The work rule that continues in force provides for a fireman on this crew, and that is not changed because the particular fireman on duty dies or retires.

Conversely, however, if the work rule in effect on the last day of the Award provided that a fireman was not required for a particular engine crew—because that crew was included on the carrier's list of proposed blankable jobs and the union's local chairman did not designate it for retention of a fireman, within the ten percent of crews he could control—the work rule does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by

the end of the effective period of the Award.[2] The carrier may thereafter transfer him, or refuse to replace him when he dies or retires. Such action would not constitute a change in work rules but simply an action in accordance with the work rule in force on the critical date, a rule which provided that no fireman was required for that crew.

The National Diesel Agreement was not set aside by the Board. As already noted, the opening section of the Award provided that agreements in force continued in effect except as they were modified by the Award. The Award provided a procedure for modifications during the two-year life of the Award. We recognize that it may be turning back the clock to an era that two presidential boards and the Neutral Members of Board 282 have agreed is technologically outdated, but taking into account the structure of Award 282 as issued, we see no alternative to holding that any new runs created after Award 282 are subject to the National Diesel Agreement, and its requirement of a fireman on each engine crew.

Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its lifetime was the fact that the change was blocked by a state's full crew law. The Supreme Court has expressly held that while such state law was in effect the Board had no capacity to make a change contrary to its provisions. *See Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R.R.*, 382 U.S. 423 (1966). The opening sections of the Award dealing with the use of firemen and with crew consists provided for the continuation of work rules, however established, unless changed pursuant to the Award. The repeal of a full crew law subsequent to the expiration of Award 282 came after expiration of the Board's authority under the temporary statute and after expiration of the power of a carrier to invoke the procedures of the Award.

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[2] The work rules effectuating the changes made under the Award included the ancillary protective provisions of Part II.C for individuals transferred or separated in implementing the change. These work rules continued in effect after the Award.

II *Validity of Awards Made January 25, 1966.*

In one respect we have decided to grant reconsideration and modify our opinion as requested by the carriers. In our opinion of May 12, we held that Award 282 was no longer in existence on January 25, 1966, when a special adjustment board rendered crew consist awards between the BRT and two carriers, and that therefore these awards were without legal significance.

We rejected by implication the carriers' argument in brief that the BRT had stipulated to the contrary. On rehearing the carriers point out decisions interpreting statutory provisions that an act be done within a specified period from the date of another action or event so that the initial or trigger date is excluded from the computation. As we were aware, that is of course the modern doctrine and is established by the decisions of this court among others.[3] It is the rule adopted by Rule 6 of the Federal Rules of Civil Procedure. We thought this rule inapplicable because the starting date did not involve problems of a fractional day, and was in turn determined by a still earlier computation beginning with an initial date that was concededly excluded from computation. This led us to the view that the two-year period prescribed by the Act as the life of the Award did not extend beyond 731 full days (two years of 365 days each, plus February 29, 1964), and that the Award which started at 12:01 a.m. on January 25, 1964, should not be stretched to include the 732nd day of January 25, 1966. We felt that in the peculiar setting of this law that legislative consideration should prevail over the customary formula for computing time.

On further reflection, we think that while this analysis may be sound for an appraisal of the problem in the first instance, a doctrine not adverted to by the parties preempts the question. There is hornbook learning to the effect that where there is doubtful language in a statute for performance of an act, the courts prefer that which will confirm rather than destroy any bona fide transaction

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[3] *E.g.*, Freeman v. Pew, 61 App. D.C. 223, 59 F. 2d 1037 (1932); Burnet v. Willingham Loan & Trust Co., 282 U.S. 437, 439-40 (1931); Prince v. United States, 185 F. Supp. 269, 271-272 (E.D.Wis. 1960).

or title. 52 AM. JUR. *Time* § 18 (1944). This is powerfully underscored by the doctrine, highly relevant to modern needs, that where statutes have been entrusted to administrative agencies for implementation, their construction should be given effect unless plainly unreasonable or in conflict with the plain intent of the legislature.

Board 282 was keenly aware of the problems it faced in possessing only temporary authority. It purposefully selected a standard for the manning rule for firemen that could practicably be administered within that limited time. When the special board assumed that it had the authority to act on January 25, 1966, it must be presumed to have considered the question carefully and with a view to conforming to the intent of Congress as nearly as it could discern that intent.

We note that the Union did not promptly protest the awards as untimely. And further indication that even the Union regarded the time question as at least doubtful appears from the fact that their notices used a January 26, 1966 date as the effective date for proposed changes. We acquiesce in the interpretation of this doubtful question by the special board involved, since we cannot say this interpretation was unreasonable or violated any plainly ascertainable legislative intent. Accordingly we honor the board's conclusion that January 25, 1966 was the final day of the Award, and hold that the special arbitration awards rendered on that date were effective.

III *Applicability of Section 8 of the Norris-La Guardia Act.*

A. Brotherhood of Railroad Trainmen (BRT)

Appellant Union seeks a ruling that even assuming the District Court had jurisdiction to issue a restraining order, the issuance of the order reflected error in this case.

We are clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-La Guardia Act. We affirmed that conclusion in No. 20316, and fully adhere to that ruling.

Although the District Court had jurisdiction to issue the restraining order we think it erred in doing so because—

as we subsequently held in our May 12, 1967 ruling—the complainant carriers had failed to comply with their obligations under the Railway Labor Act. Section 8 of the Norris-La Guardia Act, 29 U.S.C. § 108 (1964), provides that a federal court shall not grant a restraining order or injunction in a labor dispute where the complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question."

The issuance of the restraining order was conditioned on the carriers' posting a bond to make good damages, not to exceed $10,000, sustained by any party wrongfully restrained. We think the Union, which had to obey the injunction or suffer penalties for contempt of court, is entitled to a ruling from this court that vacates an erroneous determination of the District Court, although of course we do not purport to describe what if anything the Union is entitled to collect on the bond.

The District Court erred in concluding that because it held, correctly, that the action was not subject to Section 4 of the Norris-La Guardia Act, which would have ousted the court of jurisdiction, it necessarily followed that the "clean hands" provision of Section 8 of the Norris-La Guardia Act was likewise wholly inapplicable. The Supreme Court has said, speaking through the Chief Justice, that "there must be an accommodation" of this Act with the Railway Labor Act. *Brotherhood of Railroad Trainmen* v. *Chicago R. & Ind. R.R.*, 353 U.S. 30, 40 (1957). That principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act, and yet be subject to Section 8 of that Act. That is the conclusion of other courts which have considered the matter,[4] and we agree. The point is, simply, that

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[4] *See* Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F. 2d 21, 37-40 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Chicago, Rock I. & Pac. R.R. v. Switchmen's Union, 292 F. 2d 61, 64-66 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962); Elgin, J. & E. Ry. v. Brotherhood of Railroad Trainmen, 302 F. 2d 540, 544-45 (7th Cir.), *cert. denied*, 371 U.S. 823 (1962); Manning v. American Airlines, Inc., 221 F. Supp. 301, 304-06 (S.D. N.Y. 1963); *cf.* Brotherhood of Railroad Trainmen v. Toledo P. & W.R.R., 321 U.S. 50, 60-65 (1944); Brotherhood of Railway Clerks v. Florida E. C. Ry., 384 U.S. 238, 247 n.8 (1966); Brotherhood of Railroad Carmen v. Chicago & Nw. Ry., 354 F. 2d 786, 794-76 (8th Cir. 1965).

Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations.[5] That purpose would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives.

On the other hand a ruling that Section 8 of the Norris-La Guardia Act is applicable to actions to enjoin violations of the Railway Labor Act would not trammel but would rather further the effectuation of that Railway Labor Act, for it ensures compliance by complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act.

It may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8—a statutory focusing so to speak of an equity approach whereby lack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved. In a particular case the District Court might conclude that the question of the applicability of Section 8 was doubtful, would require time to explore, and that the restraining order should issue forthwith to avoid jeopardizing the Railway Labor Act. Such approaches would recognize that Section 8 of the Norris-La Guardia Act has some applicability, and is a legislative instruction that weighs heavier in the scale than the clean hands doctrine taken merely as a general equity maxim, yet is overborne by requirements of the Railway Labor Act. Here, however, the approach of the District Court was that Section 8 of the Norris-La Guardia Act was completely inapplicable and that was error. In saying that the restraining order was erroneously entered, however, we do not mean that would excuse a contemptuous violation.

We have said enough to demonstrate that the approach used by the District Court was erroneous. As we have decided, the complainants lack clean hands and the defendants were not threatening the violation. Therefore, we now rule that the District Court, taking all circumstances into consideration, should permit the Union to

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[5] Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

recover on the $10,000 bond if indeed it can establish that it sustained ascertainable damage from the issuance of the restraining order.

B. Order of Railway Conductors and Brakemen (ORCB)

This Union argues that, even assuming its notices of March 23, 1965 were premature (as held in our May 12 opinion), the temporary restraining order against the strike was invalid because Section 8 of the Norris-La Guardia Act prohibits the granting of a restraining order to a complainant "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Neither the unclean hands doctrine, nor its crystallization in Section 8 of the Norris-La Guardia Act, operates to deny relief to a complainant merely because it has declined to short-circuit the plan envisaged by Congress for obtaining a durable resolution of vexing questions. Congress contemplated that the parties would resume negotiation after they had garnered experience from actually living with the rules decided upon by the arbitrators after giving "due consideration to the effect . . . upon adequate and safe transportation service to the public and upon the interests of the carrier and employees." (*See* Section 7(a) of Public Law 88-108.) The general requirement in Section 8 for reasonable efforts at negotiation does not contemplate a departure from the assumptions of a specific statutory plan. Therefore, entry of the restraining order was not improper.

* * * * *

The Unions have assumed that a full decree will be entered by this court. We think the proper course is to remand for the District Court to enter decrees in accordance with our rulings. We approve its approach on matters drawn into question except as indicated in our opinions.[6]

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[6] We affirm both the reasoning and result reached by the District Court in construing the effect of the agreements entered into between the BRT and the Kansas City Southern Railway and Louisiana & Arkansas Railway, and the Wichita Terminal Association. We agree that the correspondence

The various judgments and decrees appealed from are accordingly vacated and the causes remanded for the entry of fresh decrees not inconsistent with our opinions.

So ordered.

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between the BRT and the Richmond, Fredericksburg & Potomac Railroad constituted a crew consist agreement of the same duration as an award by a special adjustment board.

We also approve the District Court's holding that Southern Railway Company and its subsidiaries were proper parties plaintiff in suits involving the ORCB and were covered by Award 282.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,152, 20,158, 20,172, 20,191, 20,192, 20,193, 20,215, 20,216, 20,229, 20,249

Appeals from the United States District Court for the District of Columbia

Before: DANAHER, Circuit Judge; BASTIAN, Senior Circuit Judge; and LEVENTHAL, Circuit Judge.

JUDGMENT

[Filed July 31, 1967]

These causes came on for hearings on the records of the District Court and the briefs submitted by counsel, and were argued by counsel.

On May 12, 1967, this court filed an opinion in the above-captioned causes, and invited the parties to submit proposed judgments and to request supplemental rulings within ten days thereafter.

The railroads submitted proposed judgments, and requests for supplemental rulings, and filed petitions for rehearing. The unions also submitted proposed judgments and requests for supplemental rulings, and filed oppositions to the railroads' petitions for rehearing.

Upon consideration of the foregoing, it is

ORDERED AND ADJUDGED by the Court that, except insofar as they are granted in the supplemental opinion filed this date, the aforesaid petitions for rehearing are denied; and it is

FURTHER ORDERED AND ADJUDGED by the Court that, insofar as reflected in the supplemental opinion filed this date, the requests for supplemental rulings are granted; and it is

FURTHER ORDERED AND ADJUDGED by the Court that these cases are remanded to the District Court with directions to vacate the orders and decrees appealed from herein and enter orders and decrees consistent with the opinion of this Court filed May 12, 1967, and the supplemental opinion filed this date.

Per Curiam.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,192, 20,193, 20,215, 20,216

Before: DANAHER, Circuit Judge, BASTIAN, Senior Circuit Judge, and LEVENTHAL, Circuit Judge, in Chambers.

MEMORANDUM AND ORDER

[Filed September 21, 1967]

These cases were argued on cross-appeals filed by the Brotherhood of Locomotive Firemen and Enginemen (BLFE) in Nos. 20192 and 20193, and by the carriers, Bangor and Aroostook Railroad Co., et al, in Nos. 20215 and 20216.

This court rendered an opinion in these cases, and others consolidated therewith, on May 12, 1967, and filed a supplemental opinion on July 31, 1967.

The carriers filed a petition for rehearing and clarification on August 15, 1967, and on August 25, the BLFE filed a memorandum in opposition to that petition.

The carriers assert, among other things, that this court's opinion, and particularly its supplemental opinion, reflects a misunderstanding of the meaning and application of Award 282 intended by the Board of Arbitration (Board 282).

This court has determined that Board 282 has continuing vitality for deciding questions of interpretation as to the scope and application of the Award. (Opinion of May 12, 1967, pp. 39-40.) It has also made clear that even on a question where the Board did not have final authority, i.e. interpretation of the underlying statute, the court would accept the interpretation of the Board, even though contrary to the interpretation the court would itself have rendered, so long as the Board's interpretation was not unreasonable or contrary to ascertainable legislative intent. (Supplemental opinion of July 31, 1967, p. 15).

ACCORDINGLY, now upon consideration of the foregoing, of this court's opinions above cited, and on the record before the court,

It is ORDERED by the court that the carriers' petition of August 15, 1967 is denied, without prejudice however to the Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award. Issuance of the mandate will be stayed for thirty days.

It is FURTHER ORDERED that the court's supplemental opinion of July 31 be clarified by the addition of the following as a final paragraph of part I of the opinion (p. 13 of slip opinion).

"The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. The Court noted in Rock Island, supra, 382 U.S. at 423:

> Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this dispute was not over the size of crews in States which had full-crew laws.

The Board authorized the carriers to list jobs for blanking, and thus provide a classification "when and if such full crew laws are amended or repealed." Answer of May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2). But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. *See Opinion of Neutral Members,* quoted *supra,* 41 LAB. ARB. at 681. The Board's energy was not limited to "the dispute which was before it [Congress]" at the passage of the law, but also extended to firemen manning disputes arising during the critical 2-year period. But the Board's order and interpretations cannot be stretched beyond the Congressional frame of reference to resolve academic differences or disputes that were neither in being at the time nor projected as arising during the 2-year period."

So ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,192, 20,193, 20,215, 20,216

Before: DANAHER, Circuit Judge, and BASTIAN, Senior Circuit Judge, and LEVENTHAL, Circuit Judge.

ORDER

[Filed November 9, 1967]

1. On consideration of the motion of the appellees in Nos. 20,192 and 20,193, and appellants in Nos. 20,215 and 20,216, hereafter referred to as "carriers," to vacate the order entered September 21, 1967, denying the carriers' petition for rehearing and clarification, and on consideration of the alternative motion of these carriers for stay of further proceedings, and/or for stay of mandate pending action of Board 282, and on consideration of the opposition to said motions and of the carriers' reply to said opposition; and

On consideration of the communication by Board 282 to the Clerk of this court, October 19, 1967, declining to make any submission to this court as amicus curiae, it having been provided in the order of September 21, 1967, that the mandate be stayed for 30 days and that the denial of the carriers' petition for rehearing and clarification was without prejudice to the Board's seeking leave within 30 days to submit as amicus curiae a showing of respects, if any there be, in which the opinions in this court entered May 12, 1967, and July 31, 1967, are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award,

It is ORDERED by the court that the foregoing motions of the carriers are denied.

2. On consideration of the alternative motion of the carriers for stay of mandate pending the filing by the carriers with the Supreme Court of a petition for writ of certiorari,— which motion is construed under the circumstances as a representation under Rule 27(e) that counsel had been instructed to prepare a petition for certiorari,

and that such petition will be filed within the period permitted by law, and on consideration of the motion of appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216, for an order staying the mandate and transmission of opinions and certified copy of the judgment,

It is FURTHER ORDERED that the court hereby stays its mandate and transmission of its opinion and certified copy of the judgment for the period permitted by law for filing a petition for certiorari.

So ordered.

APPENDIX B: PUBLIC LAW 88-108

ACT OF AUGUST 28, 1963, 77 STAT. 132, U.S.C. TITLE 45, FOLLOWING § 157

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dispute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and

procedures of an arbitration agreement: Therefore be it *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the

papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint

resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.